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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

LINDA AGURS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	14
Appendix A	1a
Appendix B	15a
Appendix C	17a
Appendix D	19a

CITATIONS

Cases:

Barbee v. *Warden*, 331 F. 2d 842	11
Brady v. *Maryland*, 373 U.S. 83	6, 7, 8, 9, 10, 11, 12, 14
Evans v. *Janing*, 489 F. 2d 470	10
Giglio v. *United States*, 405 U.S. 150	7
Giles v. *United States*, 386 U.S. 66	14
Hayes v. *United States*, 367 F. 2d 216	5
Levin v. *Katzenbach*, 363 F. 2d 287	11, 12
Moore v. *Illinois*, 408 U.S. 786	8, 10, 11, 12
Pyle v. *Kansas*, 317 U.S. 213	7
Shuler v. *Wainwright*, 491 F. 2d 1213	13
United States v. *Baxter*, 492 F. 2d 150, certiorari denied, 416 U.S. 940	13
United States v. *Brawer*, 367 F. Supp. 156, affirmed, 496 F. 2d 703	12

Cases—Continued	Page
United States v. *Burks*, 470 F. 2d 432	5
United States v. *Keogh*, 391 F. 2d 138	10, 11, 12, 13
United States v. *Rosner*, 516 F. 2d 269	13
United States v. *Ruggiero*, 472 F. 2d 599, certiorari denied, 412 U.S. 939	10, 12
United States v. *Schembari*, 484 F. 2d 931	13

Constitution, rule and authority:

United States Constitution:	
Fifth Amendment	2
Rule 33, Federal Rules of Criminal Procedure	9, 12
2 Wigmore, *Evidence* §§ 246, 248 (3d ed. 1940)	5

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 510 F. 2d 1249.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1975 (App. B, *infra*). A timely petition

for rehearing with suggestion for rehearing *en banc* was denied on August 6, 1975 (Apps. C and D, *infra*). On August 28, 1975, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the defense is aware of the probable existence of certain information and makes no request for its production, and the prosecution believes in good faith that the information is immaterial, the prosecutor's nondisclosure of this information constitutes a deprivation of due process of law.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, respondent was convicted of second-degree murder and sentenced to a term of five to twenty years' imprisonment. Respondent neither testified nor produced any evidence in her own behalf at trial. Her defense was based on a claim of self-defense presented solely through

argument of counsel to the jury. With the one exception noted, the facts set forth below are taken from the court of appeals' opinion.

1. On the afternoon of September 24, 1971, decedent James T. Sewell was stabbed to death in a northwest Washington motel. Respondent did not deny that she was responsible for Sewell's death or that she had inflicted the stab wounds. The prosecution introduced evidence tending to show that respondent was a prostitute, and its theory of the case was that Sewell had discovered her searching through his clothes for money when he returned from the bathroom to the motel room that they were occupying; when he attempted to reclaim his funds, respondent stabbed him repeatedly with his knife, which lay among his clothes, and fled taking Sewell's money with her.[1] Sewell was stabbed in the chest and abdomen and slashed about the arms and hands; he subsequently died of these injuries. There were no cuts or wounds on any part of respondent's body.

Respondent's counsel argued that the jury could conclude that she had acted in self-defense. He supported this contention by reference to the presence of a pocket knife in decedent's pocket, his possession of a Bowie knife at the time the couple registered, and the testimony of one witness that, when discovered by motel employees, Sewell lay atop respondent

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[1] Sewell and respondent had registered for a room as man and wife; motel employees observed that Sewell was then wearing a Bowie knife in a sheath.

as they struggled for the knife. The jury nonetheless found appellant guilty of second degree murder.

During pretrial interviews of witnesses, defense counsel became aware of the possibility that Sewell might have been previously arrested for and convicted of violent crimes. Before pursuing this line of inquiry, however, he ascertained from respondent that she knew of no violent acts in Sewell's past. Her attorney believed that, under then-existing law, a decedent's prior convictions for violent crimes were inadmissible to prove self-defense unless the person accused of the crime had actual knowledge of them at the time of the homicide. Upon obtaining corroboration of his understanding of the law from other attorneys, respondent's attorney concluded that any further search for decedent's criminal record would be pointless. Defense counsel neither subpoenaed nor requested that the prosecution produce decedent's criminal record. No testimony was introduced at trial concerning Sewell's past arrests or convictions for violent crime. Sewell had in fact been convicted in 1963 for assault and carrying a dangerous weapon and in 1971 for carrying a dangerous weapon; both incidents involved knives.

The prosecution shared defense counsel's belief that, under precedents governing at the time of trial, the evidence of decedent's prior convictions, because not known to the respondent, would not have been admissible on her behalf (Transcript of July 24, 1973 Hearing at 11).

Approximately three months after the completion of respondent's trial, the United States Court of Appeals for the District of Columbia Circuit held, in *United States* v. *Burks*, 470 F. 2d 432, that, irrespective of the defendant's knowledge thereof, evidence of past violent acts by a decedent is admissible in a homicide case in which a claim of self-defense is raised, because of its relevance to determining who was the aggressor.[2] *Id.* at 434, n.4. Upon being apprised of this decision, respondent's attorney approached the United States Attorney's office to ascertain whether or not Sewell had had a criminal record. A search of the prosecution's files revealed the information concerning Sewell's convictions. Defense counsel thereupon filed a motion for a new trial on the basis of newly discovered evidence. The trial court denied the motion, finding that admission of decedent's record would not have made any difference to the jury's verdict.

2. The court of appeals reversed respondent's conviction and remanded the case for a new trial, holding that the prosecution's failure to furnish the defendant with the past criminal record of the deceased

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[2] The general rule elsewhere appears to be that evidence of specific conduct of the decedent involving assaults on persons other than the defendant is not admissible unless known to the defendant. *Hayes* v. *United States*, 367 F.2d 216, 223 (C.A. 10); see 2 Wigmore, *Evidence* §§ 246, 248 (3d ed. 1940). This issue, which was an essential predicate for the decision below, does not appear to be of sufficient importance to merit consideration by this Court, and we accordingly are not presenting it for review.

on its own initiative constituted a denial of due process of law under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. Although it recognized that "[n]o clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession" (App. A, *infra*, p. 9a), the court of appeals nevertheless held that the evidence not disclosed by the prosecution was sufficiently material to the question of respondent's guilt or innocence to overcome the absence of prosecutorial culpability and any lack of defense diligence.

3. The government's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals. Four active judges, joined by Senior Judge Danaher, a member of the original panel, filed a statement disagreeing with the panel opinion and expressing the belief that the case should have been reheard by the full court [3] (App. D, *infra*, pp. 20a-22a).

REASONS FOR GRANTING THE WRIT

In holding that the prosecution's failure to reveal decedent's prior criminal record to defense counsel constituted reversible error even though there had been no defense request for the information, the court

[3] Judge Leventhal filed a separate statement explaining his disagreement with the panel opinion and his reasons for voting against *en banc* consideration. App. D, *infra*, pp. 22a-24a.

of appeals has rendered a decision on an important question of constitutional law that conflicts with decisions of this Court and of several courts of appeals. Moreover, the decision below is of great practical significance because of its broad implications for the procedures that the prosecution must employ in handling all criminal cases. The court of appeals' virtual elimination of the requirement that there be some meaningful defense request for production of information will result in the imposition of an exceptionally onerous burden on good faith prosecution efforts to comply with its responsibilities under *Brady*. Because of the uncertainties created by this decision, guidance from this Court is needed to enable the government to formulate standards for the training and instruction of its attorneys in their responsibilities to disclose evidence to criminal defendants.

1. The government's failure to disclose exculpatory evidence to a criminal defendant and to prevent submission to the jury of evidence known to be false constitutes a denial of due process of law when the evidence itself is material to the jury's determination. *Pyle* v. *Kansas*, 317 U.S. 213; see *Giglio* v. *United States*, 405 U.S. 150. Even if no false evidence is submitted to the jury, the prosecutor's wrongful failure to disclose exculpatory evidence to the defense may violate due process requirements. *Brady* v. *Maryland*, 373 U.S. 83. Twice previously this Court has indicated that the culpability of the prosecution's nondisclosure of evidence is dependent upon the pres-

ence or absence of a prior defense production request. In *Brady* the Court held that the suppression by the prosecution of evidence favorable to the defendant, despite his request for its production, constitutes a denial of due process of law if the evidence withheld is material either to the guilt or punishment of the accused. It was this withholding of exculpatory evidence *demanded by the accused* which cast the prosecutor in the role of an architect of an unjust proceeding and constituted error of constitutional dimension.

As reiterated in *Moore* v. *Illinois*, 408 U.S. 786, 794-795, the essence of the holding in *Brady* is the prosecution's suppression of material exculpatory evidence in the face of a defense production request. The standards by which the government's conduct is to be measured for possible due process violations are (a) whether the evidence was suppressed by the prosecution after a defense request, (b) its favorable character for the defense, and (c) its materiality.

In the instant case, by contrast, the court of appeals did not adhere to the *Brady-Moore* formulation of prosecutorial misconduct in ignoring a specific defense production request as the ground for overturning the conviction. Instead, it held that the possibly exculpatory nature of the undisclosed evidence, considered objectively and without regard to improper governmental behavior, was a much more significant factor in determining whether respondent had been denied a fair trial (App. A, *infra*, p. 10a). While

acknowledging in passing that there was no request, the court of appeals' opinion shows that it gave almost no weight to that factor, even though the attorneys' shared reasonable belief that the evidence would be inadmissible negates any inference of bad faith nondisclosure.

Nothing in the *Brady* rationale justifies the court of appeals' complete disregard of the customary requirement of a meaningful defense request as a predicate to transformation of the prosecution's failure to volunteer evidence such as decedent's criminal record into a denial of due process of law. The exculpatory nature of the undisclosed evidence is of course a necessary prerequisite to the award of a new trial; but it is not sufficeint of itself to invoke the *Brady* doctrine, because it does not demonstrate the necessary element of improper prosecutorial behavior. Furthermore, the materiality requirement must always be satisfied, but nothing in this Court's explication of *Brady* suggests that a finding of materiality renders the other elements unnecessary to a finding of denial of a fair trial.[4] The court of appeals' effective disregard of the prior request criterion is therefore inconsistent with this Court's explication of the due process requirement.

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[4] Of course, newly discovered exculpatory evidence that casts serious doubt upon the validity of the guilty verdict may afford grounds for awarding a new trial under Rule 33, Fed. R. Crim. P., even though there has been no violation of due process requirements. But the district court concluded that the evidence here in question did not satisfy Rule 33 standards, and the court of appeals did not overturn that conclusion.

We do not here suggest that the absence of a defense request will always automatically foreclose a *Brady* claim. A deliberate governmental decision to suppress information of central importance to the defense, made for the specific purpose of deception, or even a failure to disclose exculpatory evidence whose high value to the defense could not escape the prosecutor's attention, may violate the prosecution's obligation to ensure, *sua sponte*, that the accused is not wrongfully convicted. See *United States* v. *Keogh*, 391 F. 2d 138, 146-147 (C.A. 2); *Evans* v. *Janing*, 489 F. 2d 470 (C.A. 8). Except for these extraordinary situations, however, the *Brady* rule does not require the prosecution to search its files *sua sponte* for all information possibly helpful to the defense. *Moore* v. *Illinois*, *supra*, 408 U.S. at 795. Rather, it assures the defendant that he will not be denied access on request to exculpatory evidence known to the government but unknown to him. *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939.

Thus, the presence or absence of a defense production request plays a crucial role in determining whether the prosecution's handling of evidence has denied the accused due process of law. A production request puts the prosecution on notice[5] that the de-

[5] Since the function of the defense production request is to inform the prosecution of the evidence needed to prepare for trial, the request must be narrowly and meaningfully drafted. A general request for all exculpatory information should be viewed as no better than no request at all.

fense considers certain exculpatory evidence of importance at the forthcoming trial. The request thereby changes the standards applicable to the government's behavior (see *United States* v. *Keogh*, *supra*), placing the prosecutor under a duty to determine whether the government's files contain exculpatory information of the kind requested, and failure to use due care in identifying, assembling, and disclosing such evidence may constitute prosecutorial misconduct.

2. In considering the materiality of the undisclosed evidence, the court of appeals found that respondent's conviction must be reversed if the undisclosed evidence might have led the jury to entertain a reasonable doubt as to her guilt (App. A, *infra*, pp. 10a-11a).[6] That is the lowest possible standard of materiality under the *Brady* rule, one that usually is applied in cases of deliberate prosecutorial misconduct. *United States* v. *Keogh*, *supra*. Manifestly, however, the element of improper response to a de-

[6] *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4), cited as justification for the emphasis on materiality, was a drastically different case. It was there held that the prosecution denied the defendant a fair trial by marking his gun for identification and questioning eyewitnesses about it without disclosing to defense counsel or the court that police ballistics tests conclusively proved that the weapon was not involved in the crime. In *Levin* v. *Katzenbach*, 363 F.2d 287 (C.A.D.C.), the defendant's conviction was reversed for newly discovered evidence under a low materiality standard, even though there was no suggestion of prosecutorial misconduct. However, the decision in *Moore* v. *Illinois*, *supra*, seriously undermines its precedential value.

fense production request should substantially reduce the showing necessary to obtain a new trial. See *Brady* v. *Maryland*, *supra*, 373 U.S. at 87-88; *United States* v. *Keogh*, *supra*, 391 F. 2d at 147-148. By the same token, where the prosecution's nondisclosure evidences no malice or bad faith, there has been no defense request, and the evidence is not so unexpected or obscure that the defense could not have framed a meaningful request, a much higher materiality threshold should be imposed in order to award the defendant a new trial. That standard, we suggest, should be the same as that normally required to obtain a new trial on grounds of newly discovered evidence under Rule 33, Fed. R. Crim. P.

Here, the defense was aware of the underlying facts and could easily have obtained the exculpatory information itself by subpoena or drafted an appropriate production request; accordingly, the government's unprompted failure to disclose the decedent's criminal history cannot constitute a denial of respondent's constitutional rights under this Court's decisions in *Moore* and *Brady*. *United States* v. *Ruggiero*, *supra*; *United States* v. *Brawer*, 367 F. Supp. 156 (S.D.N.Y.), affirmed, 496 F. 2d 703 (C.A. 2); *Levin* v. *Katzenbach*, *supra*, 363 F. 2d at 292 (Burger, J., dissenting).

In *Brady* and *Moore*, this Court discussed the necessity of a defense production request without explicating in any depth the effect of its presence or absence on the standards by which the materiality of the evidence discovered after trial should be assessed.

We submit that the instant case presents an appropriate opportunity for the establishment of such standards.

3. The court of appeals' reduction of the defense request requirement to a virtual irrelevancy and its adoption of a relaxed standard of materiality in the absence of prosecutorial misconduct conflict with decisions of at least four other circuits. *United States* v. *Baxter*, 492 F. 2d 150 (C.A. 9), certiorari denied, 416 U.S. 940; *United States* v. *Schembari*, 484 F. 2d 931 (C.A. 4); *United States* v. *Rosner*, 516 F. 2d 269 (C.A. 2); *United States* v. *Keogh*, *supra*; *Shuler* v. *Wainwright*, 491 F. 2d 1213 (C.A. 5). That conflict should be resolved by this Court.

4. The decision below has potentially revolutionary implications for the standards of conduct governing the behavior of federal government prosecutors in almost all criminal cases. The court of appeals has effectively required the prosecutor to make an accurate pretrial analysis, at the risk of reversal, of the possible utility of all information in his files to the defendant at the forthcoming trial, without the guidance and perspective provided by a meaningful production request by the defense. If the course of the trial should thereafter reveal that evidence not selected for disclosure might have been material to the jury's determination, the resulting verdict becomes subject to successful attack. The costs, delay and uncertainty of this procedure are evident. Given the unpredictable nature of trial proceedings and the obvious institutional interests in

avoiding retrials, the operational effect of the court of appeals' ruling may be a dramatic expansion of discovery in criminal cases, thereby significantly altering the traditional character of criminal trials.[7] See *Giles* v. *Maryland*, 386 U.S. 66, 119 (Harlan, J., dissenting).

In any event, right or wrong, the ruling below creates substantial confusion about the standards properly utilized by United States Attorneys in instructing their subordinates of their *Brady* responsibilities and requires clarification by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JOHN F. COONEY,
Assistant to the Solicitor General.

SEPTEMBER 1975.

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[7] If a mere demonstration that the prosecutor's files contained evidence that might have been material to the defense is sufficient, even in the absence of a defense request, to require a new trial, the prudent course in most cases would likely be simply to throw open those files to the defense prior to trial, even though such a course would facilitate the fabrication of spurious defenses and give rise to the other evils that have caused discovery to be limited in criminal proceedings. Otherwise, the risk that some evidence not so disclosed will later be deemed material is unacceptably high.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 72-2072, 73-1956 and 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT
(two cases)

Argued Nov. 25, 1974

Decided April 3, 1975

Appeals from the United States District Court for the District of Columbia (D.C. Criminal 2081-71).

Cornish F. Hitchcock,* with whom Sherman L. Cohn, Washington, D.C. (appointed by this Court), and Steven M. Pavsner,* were on the brief, for appellant. Edwin J. Bradley, Washington, D.C. (appointed by this Court), also entered an appearance for appellant.

Gerald F. Treanor, Jr., Asst. U.S. Atty., with whom Earl J. Silbert, U.S. Atty., John A. Terry and James

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* Entered appearances as student counsel pursuant to Rule 20 of the General Rules of this Court.

F. McMullin, Asst. U.S. Attys., were on the brief for appellee. Harold H. Titus, Jr., U.S. Atty. at the time the record was filed and John O'B Clarke, Jr., Asst. U.S. Atty., also entered appearances for appellee in No. 72-2072.

Before BAZELON, Chief Judge, DANAHER, Senior Circuit Judge, and Justice,**, United States District Judge for the Eastern District of Texas.

Opinion for the Court filed by District Judge JUSTICE.

JUSTICE, District Judge:

The appellant, Linda Agurs, appeals from her conviction for second-degree murder,[1] for which she was sentenced to a term of five to twenty years' imprisonment. Apart form the issue of self-defense, there was little disagreement between the parties at trial with respect to the facts.

James T. Sewell met his estranged wife for lunch on September 24, 1971. They had planned to travel to New York together that evening, but quarreled during their meeting and parted. Mrs. Sewell testified that her husband boarded a bus at about 2:45 in the afternoon, and that he was carrying about $360.00 in his pocket.

Sewell and the appellant arrived together at a motel in Northwest Washington about 4:30 on the same afternoon. A motel employee testified that he observed that Sewell was wearing a Bowie knife in a sheath.

** Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] The offense is defined by 22 D.C.Code § 2403.

The two registered as man and wife and departed the lobby for their room. Approximately a quarter hour later, the desk clerk and two other employees heard a woman's screams emenating from the room occupied by Sewell and the appellant. They forced their way into the room and discovered the two on the bed struggling with a knife—a Bowie knife, as it was later ascertained. The employees separated them and summoned an ambulance for Sewell, who was bleeding. Appellant left the building at the time, but surrendered voluntarily to the police the next day. In the meantime, Sewell died from stab wounds inflicted during the struggle. The most serious wounds were in Sewell's chest and abdomen, but his arms and hands also exhibited cuts and slashes suggesting an attempt to repel an attack.

The appellant was indicted for second-degree murder. At the trial, it was the theory of the prosecution that the appellant was a prostitute whom Sewell had encountered in the course of the afternoon, and that she brought him to the motel in the course of plying her trade. On this theory, the appellant, dissatisfied with the amount Sewell paid her for her services, rummaged through his clothing while he was in a bathroom down a hall from their room and removed the money she found there. Sewell, returning, caught her in the act and attempted to retrieve his money, whereupon she stabbed him with the knife, which also lay among his clothes. In support of this scenario, the prosecution cited testimony that a motel employee had seen the appellant check into the motel with men

on other occasions. In addition, the witnesses to the struggle agreed that the appellant was fully dressed but that Sewell was clad only in his trousers, and that the knife was pointed at his chest during the part of the struggle that they observed. There was money neither in Sewell's wallet, which was found in the motel room after the incident, nor in his pockets, which were searched at the morgue. Finally, the prosecution stress the testimony of the nurse who examined the appellant the day after the incident; she found no cuts or wounds on any part of the appellant's body.

Appellant's attorney advanced the contention that she had inflicted the stab wounds in self-defense. He elicited testimony from the motel's desk clerk to the effect that Mrs. Sewell had appeared at the motel after the incident and told him that Sewell "would use a knife." Mrs. Sewell denied having made the statement. Counsel for appellant also noted the presence of a pocket knife in Sewell's pocket when he was taken to the morgue, emphasized the uncontradicted evidence that *Sewell* had the Bowie knife at the time the pair checked in, and developed from one of the witnesses testimony that Sewell lay atop the appellant during the struggle.

Defense counsel had become aware, during pretrial interviews with witnesses, of the possibility that Sewell might have been arrested or convicted in the past for violent crimes. Before investigating Sewell's arrest and conviction record, however, he asked the appellant whether she knew of any violent episodes in

Sewell's past; she knew of none. The attorney believed that a decedent's prior convictions for violent crimes were inadmissible to prove self-defense unless the person accused of the homicide knew of them. To reassure himself, he consulted an older lawyer who had some experience with criminal law; the older lawyer advised him that this view of the law was correct. He thus concluded that a search for Sewell's prior record would be a waste of time. Counsel also believed, he testified later, that the prosecution would advise him if they knew that Sewell had a criminal record. In any event, none of the evidence presented to the jury at trial suggested that Sewell had ever been arrested for or convicted of a crime of violence.

A month after the appellant was sentenced, defense counsel received a copy of this court's opinion in United States v. Burks.[2] The *Burks* opinion noted that this court has "long recognized" that evidence of past violent acts by a deceased is admissible in a homicide case in which the issue of self-defense is raised because "[s]uch evidence is relevant on the issue of who was the aggressor. . . ."[3] A footnote to that observation admonished that "[i]t bears emphasis . . . that as to the issue of who was the aggressor it is irrelevant that the defendant did not know about the deceased's character."[4] On learning of this long-recognized rule, of which he had been entirely ignor-

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[2] 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

[3] *Id.* at 434.

[4] *Id.* at 434 n. 4.

ant, counsel became alarmed and immediately sought to discover whether or not Sewell did, in fact, have a criminal record. He went to the United States Attorney's office and, finding the Assistant who had prosecuted the appellant absent, spoke with one of the other Assistants. The Assistant took appellant's counsel to a "closed files" room and located the file concerning the prosecution of the appellant. There, close to the front of the folder they found a paper disclosing that Sewell had been convicted in 1963 for assault and carrying a dangerous weapon and in 1971 for carrying a dangerous weapon. The weapon, in each instance had been a knife.

Defense counsel immediately filed a motion for new trial on the ground of newly discovered evidence. The trial judge denied the motion, expressing skepticism that "a CDW conviction and a '63 ADW conviction" would have made any difference in the jury's conclusions. Being convinced that his misunderstanding of the law had seriously prejudiced the appellant's plea of self-defense, her counsel later requested to withdraw, in order that the issue of his ineffectiveness could be raised by appellant's attorney on appeal.

Appellant asserts that her conviction should be reversed on three grounds. First, she contends that the trial judge erred in denying her motion for new trial. Second, she urges that her defense counsel's failure to bring Sewell's record of convictions before the jury deprived her of her sixth amendment right to the effective assistance of counsel. Finally, she argues that the prosecution denied her due process of law

under the doctrine of Brady v. Maryland,[5] which prohibits "suppression by the prosecution of evidence favorable to an accused."[6]

[1] It is unquestioned that a prosecutor's deliberate failure to supply defense counsel with information that tends to exculpate the accused constitutes prosecutorial misconduct meriting reversal of a conviction.[7] Neither party to this appeal has any quarrel with this principle. Nor can there now be any disagreement with the rule of *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[8] Appellee's first response is that the prosecution was not required to inform appellant's attorney of Sewell's record in the absence of a request for such information, and second, that the information was in

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[5] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[6] *Id.* at 87, 83 S.Ct. at 1196.

[7] *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); United States ex rel. Thompson v. Dye, 221 F.2d 763 (3d Cir.), cert. denied, 350 U.S. 875, 76 S.Ct. 120, 100 L.Ed. 773 (1955); United States ex rel. Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), cert. denied, 345 U.S. 904, 73 S.Ct. 639, 97 L.Ed. 1341 (1953).

[8] 373 U.S. at 87, 83 S.Ct. at 1196, *accord* Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

any event of such small importance in the context of the case that failure to reveal it had no effect on the verdict of the jury.[9]

At the outset, it should be observed that defense counsel's attempts to request relevant information from the United States Attorney can not categorically be characterized as lacking in diligence. The record reveals that the attorney for appellant appeared at a calendar call shortly after he had been appointed to represent her and indicated that he wished to place a stipulation regarding discovery on the record. The attorneys had encountered no difficulties in agreeing upon discovery procedures and the scope of discovery up to that point; and the trial judge, therefore, suggested to defense counsel that he return to court for formal discovery proceedings only in the event that he experienced difficulty in obtaining the materials that he desired from the office of the United States Attorney. Further, the trial judge commented that, in his experience, the United States Attorney's office always provided defense counsel with all discoverable material. Defense counsel thereupon assented to the trial judge's suggestion.

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[9] The United States does not contend that the prosecution had no knowledge of Sewell's prior record, and indeed such a contention would almost certainly be unavailing in view of the fact, already mentioned, that the information, when finally discovered by the appellant's counsel, was in a folder maintained by the office of the United States Attorney. *See* Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This is not to say that the prosecution engaged in deliberate suppression.

Even supposing that defense counsel's trusting attitude toward the prosecution, together with his failure to undertake a search for Sewell's prior criminal record, demonstrates some neglect of his duty to his client, that conclusion does not foreclose further inquiry into the possibility of unfairness to the accused. No clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession.[10] Rather than attempting to formulate universal rules, most courts faced with *Brady* challenges to convictions have examined various factors in the cases actually before them—including the diligence of defense counsel, the presence or absence of prosecutorial culpability, and the materiality of the undisclosed evidence—in arriving at their conclusions.[11] When defense counsel has been less than industrious, the prosecution guideless, and the evidence in question of doubtful materiality, the courts

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[10] Among cases that have imposed such a duty in the absence of a request are the following: United States v. Hibler, 463 F.2d 455 (9th Cir. 1972); United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Simms v. Cupp. 354 F.Supp. 698 (D.Or. 1972); Clements v. Coiner, 299 F.Supp. 752 (S.D.W.Va. 1969). *But see* United States v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968), in which Judge Friendly wrote that the court "cannot agree with petitioner that where there has not been deliberate suppression . . . the absence of a request is irrelevant."

[11] *See* United States v. Mayershon, 452 F.2d 521 (2d Cir. 1971).

have found no due process violation requiring reversal of the conviction because of the mere fact that the prosecution had access to evidence that the defense would have desired.[12] On the other hand, a prosecutor's willful failure to disclose evidence that is clearly material upon defense counsel's timely request has always been held to constitute reversible error. The difficut cases, such as the case before the court, fall between two extremes.

[2] The materiality of undisclosed evidence is a much more significant factor than prosecutorial misconduct or defense negligence. Thus, nondisclosure of evidence that would have been of central importance to the defense had it been available will void a conviction even though the prosecution may have acted in good faith or defense counsel may have failed in his duty of diligence.[13] In Barbee v. Warden,[14] the Fourth Circuit reasoned that "[i]n gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." In Levin v. Katzenbach,[15] this court held that a conviction obtained while defense counsel is ignorant of important potentially exculpatory evidence cannot be upheld merely because "more able, diligent, or fortunate counsel might possibly have come upon the evidence on his own." [16] Accordingly, the case was remanded for a determination of whether the undisclosed evidence, if brought to the attention of the jury, "might have led the jury to entertain a reasonable doubt about appellant's guilt." [17] Thus, we are constrained to consider the second point advanced by the appellee—that the evidence of Sewell's prior convictions is insufficiently material for its nondisclosure to require reversal of the appellant's conviction.

Appellant did not at any time deny that she had been responsible for Sewell's death or that she wounded him with his Bowie knife. Her sole defense was her claim that he had initially attacked her with the knife, and that her actions had all been directed toward saving her own life. In a similar situation the Supreme Court suggested that a prosecutor's failure to disclose that there was an open penknife in the deceased's pocket when his body arrived at the morgue would constitute a denial of due process, if the knife would be admissible under the trial court's customary

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[12] *See, e.g.*, United States v. Soblen, 301 F.2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Fabric Garment Co., 262 F.2d 631 (2d Cir. 1958), cert. denied, 359 U.S. 989, 79 S.Ct. 1117, 3 L.Ed.2d 978 (1959).

[13] *E.g.*, United States v. Poole, 379 F.2d 645 (7th Cir. 1967); Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Evans v. Kropp, 254 F.Supp. 218 (E.D.Mich. 1966).

[14] 331 F.2d 842, 846 (4th Cir. 1964).

[15] 124 U.S.App.D.C. 158, 363 F.2d 287 (1966).

[16] *Id.* at 162, 363 F.2d at 291.

[17] *Id. see* Levin v. Clark, 133 U.S.App.D.C. 6, 408 F.2d 1209 (1967).

rules of evidence.[18] In a murder case in which the defendant relied on self-defense, the Oregon Court of Appeals held that the prosecution's nondisclosure of a deceased's past violent history denied him due process of law.[19]

[3] Moreover, Sewell's prior convictions for crimes involving knives seem at least as crucial as non-disclosed evidence in other cases which led to reversals: *e.g.*, the fact that a prosecution witness has been granted immunity in exchange for his testimony;[20] the statement of a witness that he had no memory of certain aspects of the transaction;[21] or the circumstance that a prior romantic entanglement existed between a homicide victim and the decedent's wife.[22] In an analogous situation, the Supreme Court held that suppression of evidence of the sexual escapades of a complaining witness in a rape case in which the issue was whether or not an act of intercourse was consensual denied the accused a fair trial, although the suppression was unintentional on the part of the prosecutor.[23] Further, in United States v. Burks,[24]

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[18] Griffin v. United States, 336 U.S. 704, 69 S.Ct. 814, 93 L.Ed. 993 (1949).

[19] State v. Williams, 500 P.2d 722 (Ct.App.Or. 1972).

[20] *See* Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[21] *See* Levin v. Clark, 133 U.S.App.D.C. 6, 408 F.2d 1209 (1967).

[22] *See* Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).

[23] Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

[24] 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

this court reversed the conviction of a defendant found guilty of murder because the trial court refused to admit evidence of the exact nature of that denied the appellant herein. We there held that "the evidence he sought to introduce was vital to his defense."

The appellee argues that the convictions are merely cumulative of other evidence that did reach the jury from which it could be inferred that Sewell had a propensity to carry knives and use them aggressively. In particular, it cites the motel employee's testimony that Mrs. Sewell had told him that Sewell "would use a knife", the desk clerk's observation that Sewell was wearing a knife at the time the couple registered, and the testimony of one witness that Sewell was on top of the appellant during the struggle. Some of this evidence was weakened significantly by conflicting evidence. Mrs. Sewell, for example, testified that she never made the statement that the motel employee attributed to her. But the jury would not have been forced to resort to inferences from conflicting or ambiguous evidence in order to believe that Sewell had a proclivity for carrying and using knives if his past history had been revealed to them. The records of his convictions upon pleas of guilty to two knife-related offenses would have constituted undeniable evidence of that trait.[25]

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[25] *See generally id.* at 289, 470 F.2d at 437 ("Nor is it significant that the appellant had already brought some attention to the child killing [by the deceased] by mentioning it when he testified on his own behalf. While the jury might

Accordingly, we hold that the evidence withheld by the prosecution in this case is sufficiently material and important to the question of the appellant's guilt or innocence [26] as to overcome any lack of diligence on the part of appellant's trial counsel. This decision renders unnecessary any consideration of the appellant's arguments concerning the trial court's denial of her motion for new trial and the alleged ineffectiveness of her trial counsel.

Reversed and remanded.

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have discredited his testimony on this issue, it would have had virtually no choice but to believe [the deceased's wife] if she had taken the stand and testified that [the deceased] had killed their son.")

[26] There is some force to the appellant's argument that even if the evidence of Sewell's history might not have affected the jury's verdict as to guilt or innocence, it might have influenced the jury to consider a verdict finding the appellant guilty of the lesser included offense of manslaughter. *See* United States v. Burks, 152 U.S.App.D.C. 284, 470 F.2d 432 (1972).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Apr. 3, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 73-1956

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, DANAHER, Senior Circuit Judge and JUSTICE,* United States District Judge for the Eastern District of Texas

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes is hereby reversed and these cases are remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: April 3, 1975
Opinion for the Court filed by District Judge Justice

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Aug. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

Before: BAZELON, Chief Judge, DANAHER, Senior Circuit Judge and JUSTICE,* United States District Judge for the Eastern District of Texas

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

ORDER

On consideration of appellee's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Senior Circuit Judge Danaher would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Criminal 2081-71

[Filed Aug. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 72-2072

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

No. 74-1542

UNITED STATES OF AMERICA

v.

LINDA AGURS, APPELLANT

Before: BAZELON, Chief Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

ORDER

Appellee's suggestion for rehearing *en banc* having been transmitted to the full Court and there not be-

ing a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Statement of *Circuit Judge* Leventhal as to why he voted against rehearing *en banc* attached.

Statement of *Circuit Judges* Tamm, MacKinnon, Robb and Wilkey, joined by *Senior Circuit Judge* Danaher, as to why they voted to grant the suggestion for rehearing *en banc* attached.

Statement of Circuit Judges Tamm, MacKinnon, Robb, and Wilkey as to why they voted to grant the suggestion for rehearing *en banc*, and now joined by Senior Circuit Judge Danaher, who as one of the original panel had voted that the panel decision be reheard.

We are of the opinion that this case should have been reheard by the full court, inasmuch as the two principal underpinnings of the panel opinion are of extreme doubtful validity.

First, in spite of the fact that defense counsel was "aware . . . of the possibility that Sewell [the decedent] might have been arrested or convicted in the

past for a violent crime," defense counsel never requested the Government to produce decedent's record. The panel's holding that the Government was still required under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose to the defense a decedent's prior convictions for simple assault and carrying a dangerous weapon, three and twelve years prior to the offense, is of dubious validity in light of the Supreme Court's more recent statement in *Moore* v. *Illinois*, 408 U.S. 786 (1972), that "[t]he heart of the holding of *Brady* is the prosecution's suppression of evidence, *in the face of a defense production request*, where the evidence is favorable to the accused and is material either to guilt or punishment." 408 U.S. 794 (emphasis added). Both the prosecutor and the defense counsel here believed that the prior convictions of the decedent were inadmissible, so even if the Government has spontaneously informed defense counsel of them, defense counsel would not have sought to have introduced them at trial.

Second, both counsel were probably correct; the panel's ruling that "evidence of past violent *acts* by a deceased is admissible in a homicide case in which the issue of self-defense is raised" (emphasis supplied) is erroneous and a substantial departure from the accepted rule. "The general rule is that the general reputation of a decedent may be shown, but that *specific acts* against other persons than the defendant, which are remote in point of time, are not admissible *when* they are *not known* by the defendant." *Hayes* v. *United States*, 367 F.2d 216, 223 (10th Cir. 1966)

(emphasis supplied). The fact situation, as described in the panel opinion, indicates that the decedent and the accused had the sparsest of acquaintanceship prior to their rendezvous in the motel room. There was never a claim by the accused that she knew of any violent character or acts of the decedent, for, in spite of the inference to be drawn from the language in the panel opinion, the appellant at no time took the stand. The whole theory of self-defense was conjured by her trial attorney in argument.

This Circuit has not adopted the two principles of law relied on in the panel opinion to reverse this conviction for second degree murder. If we are to adopt such principles, which we believe are in contrast to long-standing rules in this and other Circuits, it should be on a hearing *en banc*.

Statement of Circuit Judge Leventhal as to why he voted against rehearing en banc.

My vote against rehearing is not necessarily an approval of the panel's judgment or opinion. But there is a limit to the number of cases we can take en banc.

I am certain that the doctrine of *Brady*[1] is confined to cases where there has been a request by the defense, even though that has thus far been requisite by the Supreme Court.[2] Certainly I agree with Judge Friendly that the making of a request is ordinarily

[1] Brady v. Maryland, 373 U.S. 83.

[2] Moore v. Illinois, 408 U.S. 786 at 794 (1972).

not "irrelevant."[3] Leaning too heavily on the request, however, may only serve to throw the inquiry into whether lack of request negates effective assistance of defense counsel. This court is not confined on direct appeal to reversal for denial of constitutional right, as is the case when it is considering collateral attack or when the Supreme Court reviews a state conviction. On direct appeal, it may reverse in the interest of justice, 28 U.S.C. § 2106, because it is concerned that the omission of defense counsel has led to a miscarriage of justice even though it cannot be labeled constitutional error.[4] *Dyer* v. *United States*, 126 U.S.App.D.C. 312, 379 F.2d 89 (1967). In my view, the decision might better have been articulated in these terms rather than constitutional concepts.

As to merits or importance of the evidence issue, there is learning in this court that, on the issue of whether the decedent was the aggressor, information about the deceased can be brought out even though it was not known to defendant—whether by evidence of the character or belligerency of the deceased (allowed as an extension of the rule admitting threats of deceased that were not communicated to defendant[5])

[3] U.S. v. Keogh, 391 F.2d 138, 147 (2d Cir. 1968).

[4] Bruce v. U.S., 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967); Dyer v. U.S. 126 U.S.App.D.C. 312, 379 F.2d 89 (1967).

[5] Evans v. U.S., 107 U.S.App.D.C. 324, 277 F.2d 354 (1960).

or by acts of the deceased.[6] The issue then becomes one of remoteness of the deceased's prior convictions.

This case is certainly not a strong one even for admissibility of the acts involved—since the assault conviction was in 1963, and the 1971 conviction for carrying a dangerous weapon was cumulative of the admitted undisputed evidence that deceased was wearing a bowie knife. Still, the conviction was one thing the jury might take into account as bearing on both the self-defense issue and the degree of the crime. The prosecution's omission here may not be as weighty as other omissions that have led to reversals in the absence of a discovery request, but the questions are one of degree.

And so, while I don't necessarily agree with the panel's result, its action in ordering a new trial does not seem to me such a departure from doctrine and acceptable standards of judicial administration as to require en banc consideration.

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[6] U.S. v. Burks, 152 U.S.App.D.C. 284, 286, 470 F.2d 432, 434 (1972).

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Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

LINDA AGURS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1975
CERTIORARI GRANTED NOVEMBER 17, 1975

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

LINDA AGURS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CONTENTS OF INDEX *

	Page
Relevant Docket Entries	1-5
Indictment	6
Calendar Call of January 10, 1972	7-12
Transcript of Respondent's Trial	13-140
Transcript of Post Trial Hearing of July 24, 1973	141-156
Judge Robinson's Order of July 24, 1973	157
Motion of Respondent's Trial Counsel for Consideration of Appointment of Substitute Counsel	158-164
Transcript of Post Trial Hearing of April 17, 1974	165-187
Judge Robinson's Order of May 7, 1974	188-190
Affidavit of Respondent's Trial Counsel filed with Respondent's brief in the Court of Appeals	191
Order Allowing Certiorari	192

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* The opinion of the court of appeals below, the statement of five judges below dissenting from the denial of the government's petition for rehearing *en banc*, and Judge Leventhal's statement on why he voted against rehearing *en banc*, are contained in the Petition for Certiorari.

DOCKET ENTRIES

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 2081-71

UNITED STATES

vs.

LINDA V. AGURS

DATE	PROCEEDINGS
1972	
Apr. 27	Called for trial; deft not present; trial continued. ROBINSON, J Rep-D. Spencer Robert Gaston, Atty
Jun. 28	Motion for issuance of subpoena, GRANTED. ROBINSON, J.
Jul. 5	Jury and 2 alts. sworn; trial begun; respited until 7-6-72 at 9:30 a.m. Remanded to custody, ROBINSON, J. Rep: D. Spencer R. Gaston, Atty.
Jul. 6	Juror No. 9. Bessie R. Jordan excused; Alt. Juror No. 1, Carrie M. McCrae takes seat No. 9 in jury box: Trial resumed; respited until 7-7-72 at 10:00 A.M.; rem. Reporter—D. Spencer; Robert T. Gaston; ATTY; ROBINSON, J.
Jul. 6	Motion for issuance of subpoena-GRANTED-ROBINSON, J.
Jul. 7	Trial resumed; same jury; Alt. Juror excused; VERDICT: GUILTY AS CHARGED; Jury polled & discharged; referred; remanded to custody.
	Note from jury filed. Accommodations for lunch ordered & issued for 12 Jurors & 2 Deputy Marshals. ROBINSON, J. Rep-D.Spencer Robert T. Gaston, Atty

DATE	PROCEEDINGS

Oct. 20 SENTENCE: (Mur. II) Five (5) years to Twenty (20) years; Remanded to custody Judgment and Commitment. ROBINSON, J. Rep: D. Spencer R. Gaston, atty.

Oct. 20 Notice of appeal from sentence of OCT. 20, 1972.

Oct. 25 Copy of docket entries sent to USCA & US Atty. Copies of notice of appeal sent to USCA, US Atty, Atty, and deft.

Oct. 20 Notice of appeal from sentence of 10-20-72. (error)

Oct. 27 Authorization for transcript of trial on July 5, 6 & 7. ROBINSON, J. #45741.

Nov. 13 Certified copy of ORDER USCA dated 11-13-72 appointing Robert T. Gastor & directing Clerk of District Court to transmit the record as promptly after the filing of transcripts as business of office permits.

Nov. 20 Record on appeal delivered to USCA; In forma pauperis (Clerk's fee $1.00) Receipt from USCA for original record

1973

Jan. 30 TRANSCRIPT of proceedings of 7-5-72; pages 1-48; Court's copy; Rep-D.Spencer TRANSCRIPT of proceedings of 7-6-72; pages 49-157; Court's copy; Rep-D.Spencer TRANSCRIPT of proceedings of 7-7-72; pages 158-191; Court's copy; Rep-D.Spencer

Feb. 1 Supplemental record on appeal delivered to USCA; receipt acknowledged.

Feb. 5 Letter dated 1-16-72 in the nature of Motion for reduction of sentence, FIAT. ROBINSON, J.

Feb. 7 Motion for new trial; c/s; p/a.

DATE	PROCEEDINGS

Feb. 20 Government Opposition to motion for new trial; Attachment 1; c/s (Attachment 2 to be attached when obtained)

Feb. 28 ORDER denying motion of deft for new trial without prejudice. (N) ROBINSON, J.

Mar. 12 MOTION for reconsideration of motion for new trial; c/s; p/s.

Mar. 30 ORDER denying motion of deft for reconsideration of motion for new trial. (N) ROBINSON, J.

Jul. 24 MOTION of Defendant for new trial; Defendant's presence waived; heard & denied. ORDER denying Defendant's motion for new trial. (N) Exhibit of Defendant to motion for new trial, filed. ROBINSON, J. Rep-D. Spencer Robert T. Gaston, Atty

Aug. 3 NOTICE of appeal from denial of deft's. motion for new trial.

Aug. 3 COPY of docket entries sent to USCA & US Atty. Copies of notice of appeal sent to USCA, US Atty, Atty, and Deft.

Aug. 6 RECORD returned from USCA; receipt acknowledged.

Aug. 7 ORDER authorizing transcript of motion for new trial on 7/24/73. (Spencer) ROBINSON, J. #100751

Sept. 4 RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Sep. 24 TRANSCRIPT OF PROCEEDINGS of July 24, 1973; Pages 1-23; Court copy; Rep-D.Spencer

Sep. 27 SUPPLEMENTAL RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Nov. 7 CERTIFIED copy of Order USCA 11-5-73 appointing Robert Gaston.

DATE	PROCEEDINGS

1974

Jan. 18 CERTIFIED copy of Order entered USCA 1-16-74 vacating Robert T. Gaston and appointing Sherman Cohn as counsel.

Feb. 22 MOTION for new trial; P/A; Affidavit and attachment; C/S MOTION for Order permitting student counsel to argue Motion for new trial; P/A; Attachment (2); C/S

Mar. 8 ORDER authorizing transcript of Calendar Call on 1-10-72. (Rep: D.Spencer) #137125 ROBINSON, J.

Mar. 12 OPPOSITION of Government to Motion for New Trial; C/S

Mar. 18 REPLY to Opposition to Motion for new trial; C/S

Mar. 25 TRANSCRIPT OF PROCEEDINGS of 1-10-72; Pages 1-8; Court copy; Rep-D.W.Spencer

Mar. 27 PRAECIPE entering appearance of Edwin J. Bradley as Co-Counsel with court-appointed counsel in U. S. C. A.

Apr. 1 SUPPLEMENTAL RECORD ON APPEAL delivered to USCA; receipt acknowledged.

Apr. 12 PETITION for Writ of Habeas Corpus ad Prosequendum for defendant (FIAT). BRYANT, J. FINDINGS, Order and Writ of Habeas Corpus ad Prosequendum to Federal Reformatory for Women. Alderson, W. Va. for defendant for 4/17/74. (N) BRYANT, J.

Apr. 17 MOTION for new trial, heard & taken under advisement; (defendant not present). ROBINSON, J. Rep-G.Fedoration E.J.Bradley, A.Rubenstein & R.T. Gaston, Attys

DATE	PROCEEDINGS

May 7 ORDER denying defendant's motion for new trial. (N) ROBINSON, J.

May 17 NOTICE OF APPEAL from Order denying motion for a new trial of 5-7-74.

May 17 Copy of Notice of Appeal to USCA and U. S. Attorney. Copy of docket entries to USCA, U. S. Attorney, Attorney and Defendant.

May 20 ORDER authorizing transcript of motion for new trial on 4-17-74. ROBINSON, J. Rep. G. Fedoration No. 137116

May 30 CERTIFIED copy of Order USCA dated 5-29-74, appointing Sherman Cohn as counsel for defendant, and directing Clerk of District Court to transmit the record as promptly after filing of transcript as business of office permits. CERTIFIED copy of Order USCA dated 5-29-74, consolidating No's 72-2072, 73-1956 and 74-1542 for all purposes.

Jun. 18 TRANSCRIPT OF PROCEEDINGS of 4/17/74; pages 1 thru 33; Court's copy. (Reporter E. T. Fedoration)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on October 6, 1971

Criminal No.

Grand Jury Original

THE UNITED STATES OF AMERICA

v.

LINDA V. AGURS

Violation: 22 D. C. Code 2403
(Second Degree Murder)

The Grand Jury charges:

On or about September 24, 1971, within the District of Columbia, Linda V. Agurs, with malice aforethought, did stab, James T. Sewell, with a knife, thereby causing injuries from which the said James T. Sewell did die on or about September 24, 1971.

A TRUE BILL:

Foreman.

Attorney of the United States in and for the District of Columbia

Copy for:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

January 10, 1972
Washington, D.C.

Calendar Call and Bond Review Hearing held before the Honorable AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

DOYNE W. SPENCER
Official Reporter

[2] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(Defendant present.)

THE COURT: This is on for bond review, is that correct, Mr. Gaston?

MR. GASTON: That is correct, Your Honor.

As to the question of bond, Your Honor, while there have been some problems with Mrs. Agurs before with

regard to leaving the half-way house, she has been a lifetime resident of the D. C. area and she has practically all of her relatives living in the area, and when she did leave the halfway house, she didn't actually leave the area.

Furthermore, as to the evidence in the case, I think that Mr. Clarke would agree that there is a substantial defense in the case of self-defense. I personally believe the Government's case is quite weak. I have discussed the matter with Mr. Clark at some length, and that conference with him hasn't changed my opinion at all in that regard.

THE COURT: I don't have in my possession a Bail Agency report.

MR. CLARKE: Your Honor, I have a Bail Agency report.

THE COURT: Could I see it.

MR. CLARKE: Which goes back to September 27th. [3] I will pass it up to the Court.

THE COURT: Would you, please.

What is the prospect of any employment?

Do you want to be heard in this matter, Mr. Clarke?

MR. CLARKE: Your Honor, I would ask that the defendant, if released, be given conditions that would ensure the safety of the community besides her appearance at trial. Those conditions being that she not be allowed to leave the metropolitan area; that she obtain employment; and, also, I would ask that the Court consider work release for this defendant.

MR. GASTON: Your Honor, the defendant has advised me that she can obtain employment within a day or two.

THE COURT: What was the relationship between the decedent and this defendant?

MR. CLARKE: Your Honor, apparently this was, I guess the easiest way to say it would be a prostitute-John relationship. They registered at a tourist home as Mr. and Mrs., and a couple of minutes after they had registered, the altercation broke out from which the decedent died.

We do not know if there was any friendship relationship besides their registering at that time.

MR. GASTON: Your Honor, if I may, I would like to point out one strong piece of evidence, or the most strong piece of evidence towards self-defense. That is, the person [4] who was running the tourist home was hearing screams of help from Mrs. Agurs, and he went to the door of the room and the screams for help continued. Because no one opened the door, he then broke it down and he found the deceased on top of Miss Agurs on the bed struggling over the knife in the matter, and she was still screaming "help" while he was still standing outside the door.

I think there is other evidence of self-defense, but that is about the strongest piece of evidence of it.

MR. CLARKE: Your Honor, I might point out to the Court, as defense counsel knows, the decedent was holding the blade of the knife, whereas the defendant was holding the handle of the knife.

THE COURT: Where would the defendant live if she were released?

THE DEFENDANT: My sister.

THE COURT: The same place you were living before on L Street?

THE DEFENDANT: Yes, sir.

THE COURT: When you were on narcotics, was it heroin?

THE DEFENDANT: Yes, sir.

THE COURT: You went right back to it when you left the half-way house, is that right?

THE DEFENDANT: Every now and then. I didn't have [5] no habit.

THE COURT: How long will it take to try this case?

MR. CLARKE: Your Honor, I anticipate at least two days.

THE COURT: What is your estimate, Mr. Gaston?

MR. GASTON: That would seem to be sufficient, Your Honor. Perhaps two and a half.

THE COURT: I think she is entitled to her release. She will live at 807 L Street with her sisters. Employment within ten days. Not to leave the Metropolitan Washington Area, and undergo narcotics surveillance. Any positive test for any kind of narcotics will bring you

right back here, Miss Agurs, right back here, and I am going to revoke the bond at that point, and you will await trial in jail if you bother with narcotics.

Now, she will have to contact the bail agency at least once a week by telephone and her lawyer once a week by telephone so he can get this case ready for trial.

Mr. Clarke, you wanted to say something?

MR. CLARKE: Your Honor, you have covered the condition I was about to offer.

THE COURT: If you prepare such an order, Mr. Gaston, and explain it to Miss Agurs very carefully, I will sign it.

MR. GASTON: Yes, Your Honor.

[6] In addition, we are here for a hearing on motions today. There are no motions to be filed. As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering if we might place that agreement on the record at this time.

THE COURT: If it is necessary. Have you had all of the discovery you want?

MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.

THE COURT: It has been this Court's experience we have never had a problem in that regard.

MR. GASTON: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

MR. GASTON: Yes, Your Honor. Mr. Clarke has also agreed to hand me the grand jury minutes one week before trial. Is that not right, Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

Your Honor, I might also point out that I have sent defense counsel a copy of the autopsy.

MR. GASTON: Then I will make this out.

THE COURT: If you will, I will pass the matter [7] until you do.

(At this point the Court proceeds momentarily with other business.)

THE COURT: Have Miss Agurs come up.

(The defendant comes to the podium.)

THE COURT: Now, when you get a job, you are supposed to notify the bail agency right away so that they know who your employer is. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And tell Mr. Gaston, also.

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you violate any of the conditions of your release, back you come. And that includes getting arrested for anything else. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you fail to show when you get notice, now, notice is going to be sent to you at 807 L Street, and that is Apartment 2, is it not?

THE DEFENDANT: Yes, sir.

THE COURT: That is where the notices are going to go to you. So you look at your mail every day, because there will be a notice when you are to come back here for trial. And if you fail to appear after you are notified, that might get you five years in jail without regard to this second degree murder business.

[8] Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I think you do. I think you do. I have ordered that you keep in touch with Mr. Gaston so he can prepare to defend you in this case. He can't do it by himself.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Allegedly you were there with the decedent. Mr. Gaston was not. And you have got to help him in order to help yourself. That is the only way he can do his job.

(Whereupon the hearing was concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned Official Reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Doyne W. Spencer
DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Wednesday, July 5, 1972
Washington, D.C.

Trial before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

CONTENTS

WITNESS	Direct	Cross	Redirect	Recross
Willetta Sewell	6	17	21	21
Lawrence E. Smith	24	40	45	

EXHIBIT	Identified	Admitted Into Evidence
Government Nos. 1-7	6	
" No. 8	23	23
" No. 9	24	
" No. 10	27	
" Nos. 11-13	34	
" No. 1	43	

[3] PROCEEDINGS

(The trial commenced at 2:05 p.m.)

MR. CLARKE: Your Honor, the Government is ready to proceed in the Agurs case.

THE COURT: Mr. Gaston.

MR. GASTON: The defense is ready, Your Honor, as soon as my client is brought out.

Also, I have a couple of preliminary matters that I would like to bring out at this time.

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(The defendant enters the courtroom.)

MR. CLARKE: Your Honor, may the record reflect that I have given to defense counsel a copy of all Jencks Act material in this case, including the statement counsel indicated was exculpatory.

MR. GASTON: I have received those items, Your Honor, at this time. I have not had a chance to read them yet.

The first matter which I wanted to discuss is the fact that there is some evidence of narcotics use on the fringes of this case. I don't see how it is at all probative, and I think it would be quite prejudicial to the defendant if statements concerning that use were admitted into evidence.

In talking to Mr. Clarke, it is my impression that he does not intend to have that brought out in the presence of [4] the jury, but I would either like a stipulation from him at this time to that effect, or I would like to make an objection to any such statements in the presence of the jury.

THE COURT: I don't understand what you mean, a stipulation. The Government knows what is probitive and what isn't, and I will rule on any objection made.

MR. GASTON: Once the statement comes out in question—

THE COURT: Mr. Gaston, don't argue with me during the course of this trial. If it is not relevant, the Government has already indicated it has nothing to do with this case and there will be no evidence. You make any objection to any question that suggests it. We have no problems at all with regard to it.

MR. GASTON: All right.

The other item, Your Honor, is that the defendant, Miss Agurs, according to my information, does have a prior conviction, an unauthorized use of a motor vehicle. I believe it was in 1970.

It's a Louck question. I realize that the new statutes permits that to be brought out for impeachment purposes, and perhaps Your Honor would like to delay—I would argue that that statute is unconstitutional, and the grounds for keeping it out would be based on the Louck and Gordon cases.

[5] Perhaps that could, if Your Honor wanted to wait until after the Government's case or now.

MR. CLARKE: Your Honor, I might add that although the defendant was initially charged with unauthorized use of a motor vehicle, there was a conviction of attempted unauthorized use of motor vehicle. This would fall under the misdemeanor section of the new Louck Statutes, and on past decisions, unauthorized use of a motor vehicle does not go to honesty. Therefore, the Government would not seek to introduce this as impeachment.

THE COURT: No problem. This is straight second degree murder, uncomplicated as far as evidentuary problems are concerned.

All right. Is there anything else?

MR. CLARKE: No, Your Honor.

THE COURT: Let's get the jury panel down.

(Voir dire examination of jury panel and the opening statements not transcribed.)

MR. CLARKE: With the Court's permission, the Government will call Mrs. Willetta Sewell.

Your Honor, in order to save time, I would ask that the following articles be marked for identification as Government exhibit numbers 1 through 7.

THE DEPUTY CLERK: Government Exhibit Numbers 1 through 7 marked for identification.

[6] (Government Exhibit Numbers 1 through 7 were marked for identification.)

Whereupon,

WILLETTA SEWELL

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. With the Court's permission, will you please state your name, and speak loudly so everybody can hear you. Will you spell your name for the Court Reporter.

A. Willetta Sewell.

Q. Is that Miss or Mrs?

A. Mrs.

Q. Mrs. Sewell, are you familiar with an individual by the name of James T. Sewell?

A. He was my husband.

Q. When was the last time that you saw your husband alive?

A. About a quarter of three.

Q. What day?

A. September 24, 1971.

Q. Going back to that day, September 24, 1971, about what time was it in the day or night that you first saw your husband?

[7] A. Between ten thirty and eleven o'clock.

Q. Do you know where your husband was working during that couple of days before and on that day, if any place?

A. He was working at the George Washington University Hospital in the housekeeping department. He was off on that Friday.

Q. Friday would be September 24th?

A. Yes, it was.

Q. Going back to that day again, where was it that you first saw your husband on that day, and what time was that again?

A. Down at 14th and New York Avenue, Northwest. It was between ten thirty and eleven. We were down at the Holloway Restaurant.

Q. Is that in the morning?

A. Yes, we were down at the Holloway Restaurant there on the corner of 14th and New York Avenue.

Q. Were you and your husband living together at that point?

A. No, we was not.

Q. Were you or your husband going any place that day?

A. Yes, we were.

Q. Where was that?

A. Well, we went shopping and we were supposed to be leaving at six o'clock going to New York, and from there to [8] Connecticut.

Q. Can you tell us, if any place you and your husband went when you met him at that time at eleven o'clock in the morning?

A. Well, we had lunch first at the Holloway Restaurant there on the corner. We left there and went to Peoples Drug Store.

Q. Try to keep your voice up, if you can.

A. We left there and went to Peoples Drug Store. He bought some after-shave lotion and some deodorant. We walked around to Hahn's which is next door from there around the corner on 13th and G and picked up his wedding band, and we left there and continued walking until we got over on 7th Street. We were just window shopping from store to store. We got over to 7th Street and we went into Hecht's, and went back up, I guess you would call it, north on 7th Street. We stopped at Majors and we ended up, we was at the Peoples Drug Store at 7th and K, Northwest.

Q. Let me go back for a moment. You say you went to pick up his wedding ring. Can you tell us where that took place, if you remember?

A. This was at Spicer's at 13th and G.

Q. What if anything happened when you picked up the wedding ring, what did you do?

A. When we picked it up, we had put it in to have it [9] stretched because he had broke his finger. After we got the ring, it wouldn't go on his finger because his finger was swollen, so he tried and tried to put it on. So the gentleman there at the jewelry store was very kind. He put it on his finger for him.

Q. Now, when it was being placed on your husband's finger, did he say anything?

A. Yes, he told him it was too tight, but the jewelry man insisted that he leave it as it was, and that way it wouldn't come off, but when my husband's finger got back into place, it would be down to the right size.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number One. I would ask that you take a look at that particular item. Can you identify it?

A. Yes, this is my husband's ring.

Q. Is that the wedding ring that you were talking about that was placed on his hand that morning?

A. Yes, it is.

Q. Now, when you left your husband later on that day at around a quarter of three, as you testified before, did he still have that ring on him?

A. Yes, he did.

Q. Now, can you please indicate where if any place you went once you got to the Peoples Drug Store, what you did and [10] what happened at that point?

A. When we got to the Peoples Drug Store, we purchased two root beer sodas. I took one and he took his. We went over to catch my bus which was across the street at Hahn's. I was going down H Street.

I got on the Seat Pleasant bus, and he waited until I got on mine, until I caught my bus.

His bus was ready to pull off, so he ran back across the street against the light and got on a 70 Silver Spring bus. He was supposed to be going to his father's house.

Q. Where does his father live?

A. He lives at 12th and Vermont, Northwest.

Q. Now, about what time was it in the afternoon that you last saw your husband?

A. It was a quarter of three.

Q. This was at 7th and New York Avenue, is that correct?

A. Yes, it was.

Q. Now, going back to that particular time and a little bit before hand, did you or your husband have any discussion of money?

A. I didn't understand you.

Q. Did your husband or you have any discussion about whether or not he had any money?

[11] A. Well, we had discussed that. He had told me that we were going to New York, which is true.

Q. Let me ask you this: Did he show you anything?

A. Yes, he did.

Q. Can you tell us about that, please.

A. Well, when we were in Peoples Drug Store, I had put my clothes in the cleaners, and he was supposed to have been getting them out. So he gave me $15 to get my clothes out of the cleaners. And at the time he asked me if I would count his money, which I did, and I counted $360 before he gave me the $15 for the cleaners after which that left him $345, and that is what he was left with when we left.

Q. Did you see where your husband took the money from when he gave it to you?

A. Yes, I did.

Q. Where did he take it from?

A. From his right pants pocket.

Q. Mrs. Sewell, are you familiar with whether or not your husband carried a wallet?

A. Yes, I am.

Q. Do you know if he was carrying a wallet that day, September 24th?

A. Yes, he was.

Q. Excuse me?

A. Yes, he was.

[12] Q. What type of wallet was that?

A. It was a brown imitation alligator wallet.

Q. Do you know if he kept his money in the wallet on that day?

A. No, he did not.

Q. Do you know if your husband had any habit about keeping money in his wallet?

A. He didn't have any habit at all of keeping it in his wallet. My husband never kept money in his wallet, if he had over $5. When he got down to $3, he would put it in his wallet. Otherwise he would keep it in his front pocket.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Two. Can you identify that particular item?

A. Yes, I can.

Q. What do you identify it as?

A. My husband's wallet.

Q. What about the papers that are there?

A. He has a letter that I wrote to him while he was in North Carolina, his insurance policy card, his National Bank card.

Q. Well, let me just simplify matters. They are his identification papers?

A. Yes, they are.

Q. Did you see any of those papers on him that day?

[13] A. Yes, I did.

Q. Mrs. Sewell, are you familiar with what type of clothing your husband was wearing that day?

A. Yes, I am.

Q. What type of clothing was he wearing?

A. He had on his blue work shirt, his blue work pants, a green knitted T-Shirt, black loafers, and he also had on a short western jean jacket.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Three. Will you take a look at that, please. Can you identify it?

A. Yes. They are his work pants.

Q. Are they the work pants that he was wearing that day?

A. Yes, it is.

Q. I would like to show you Government Exhibit Number Four for identification. Can you identify that?

A. Yes. This is his work shirt.

Q. I would like to show you Government Exhibit Number Five for identification. Can you identify that?

A. Yes. That is his T-Shirt.

Q. Was he wearing all of these items on that day?

A. Yes, he was.

Q. Now, are you familiar with what type of undershorts your husband wore, insofar as what are called boxer shorts or [14] briefs?

A. He wore briefs.

Q. I would like to show you what has been marked for identification as Government Exhibit Number Six. Can you identify that?

A. He wore shorts like that. I can't say that those are the ones he had on, sir.

Q. What type of shoes did your husband have on that day?

A. Black loafers. The top, they are not, they are made on the loafer style, but they has a high, sort of high point on them.

Q. I would like to show you what has been marked as Government Exhibit Number Seven. Can you identify that?

A. Yes, I can.

Q. What do you identify that as?

A. Those are his shoes.

Q. Mrs. Sewell, going back to that day, the 24th of September, did your husband ask you to go any place with him during the day itself?

A. Yes, he did.

Q. Will you please tell us about that.

A. Well, he asked me three or four times to go to the tourist home with him.

Q. What tourist home was he talking about?

[15] A. Roberta's Tourist Home out on Benning Road, Northeast.

Q. What if anything did you say to him?

A. I told him I was not going. So he kept insisting, and I still answered him no. The last thing he asked me just before I got on my bus was had I changed my mind, and I told him no, I had not.

Q. Now, at the time you got on your bus, what if anything did you see your husband do?

A. When I got on my bus, his bus, just before pul'ing off, he ran back across the street between the traffic to get his bus and the driver waited for him, and his bus went on and made the light.

Q. Did you see your husband any time after that?

A. No, I didn't.

Q. Did you see your husband's body any time after this?

A. Not until the night before the funeral.

Q. That was your husband's funeral, is that correct?

A. Yes, it was.

Q. Getting back to one more thing: Did you ever see your husband carry a knife?

A. Yes, I did.

Q. What type of knife did he carry?

A. A small black knife about this long, about six or seven inches.

[16] Q. Would you please demonstrate that again so we can see.

A. About this length closed.

MR. CLARKE: Your Honor, may the record reflect that is approximately three inches.

THE COURT: Very well.

MR. CLARKE:

Q. Continue.

A. It was about six or seven inches when it was open.

Q. Did you see if your husband had that knife on him that day?

A. Yes, I did.

Q. Did you ever see your husband wear a knife in a sheath?

A. No, sir.

MR. CLARKE: May I have the Court's indulgence for a second.

BY MR. CLARKE:

Q. You have indicated that your husband stopped at the drug store and picked up some items?

A. Yes, he did.

Q. When you left him that day, did you see what if anything he did with those items?

A. He had them when he left.

Q. What did he have them in?

[17] A. A Peoples Drug Store bag.

Q. What were those items again?

A. Deodorant and after-shave lotion.

MR. CLARKE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. GASTON:

Q. Mrs. Sewell, isn't it a fact that in addition to that pocket knife, your husband very often did carry a hunting knife or hunting type of knife in a sheath that he wore on his belt?

A. No, he did not.

Q. He never did?

A. No.

Q. When was it that you told the police or first told them about the money that your husband had on him that day?

A. When I talked to Detective Horstkamp and Detective Greenwell.

Q. Do you remember when that was?

A. I don't exactly remember the date, sir.

Q. Well, do you have an approximate idea how long after this incident that it was? Was it a week after, a month after, two months?

A. No, it was not.

Q. It was not what?

[18] A. It was not. I can tell you when it was. I came down—I was looking for insurance papers and an insurance card and I talked to Detective Hortskamp and Detective Greenwell. But at the time we did not mention it, and it was approximately a week later that I mentioned

about the money. I asked them about the money, where was it, along with the rest of his things.

Q. So the first time you saw Detective Hortskamp, you didn't mention the money?

A. I didn't mention the money. All I wanted right then was the papers that I needed.

Q. When was the first time that you saw Detective Hortskamp in relation to the time of this incident? Was it a week after this incident, two weeks, or when was it?

A. It was about a week afterwards.

Q. Then it was another week after that that you first mentioned the money to him?

A. No. I saw him—my husband was killed on the 24th and I went looking for his papers the week-end. I talked to him by phone. He told me to come down at No. 1 and to go over there to Homicide and they would ask them about his things.

I did, and I didn't get any consideration whatsoever. So then I goes back to him and I mentioned it to him.

I told him, also, then that he had money on him, but at the time I was nervous and I didn't remember.

[19] Q. All right. Now, do you remember what the date of that occasion was, or approximate date?

A. It was on a Monday.

Q. In the month of October?

A. Yes.

Q. In the first part of October or the last part of October?

A. The first part.

Q. Now, did there come a time—well, let me ask you first: You and your husband had been separated?

A. Off and on.

Q. How long had you been separated this time?

A. The last time?

Q. Yes.

A. About six months.

Q. All right. Had there taken place the beginnings of a reconciliation between you and your husband?

A. Yes, there were.

Q. That was the purpose of the trip to New York?

A. Yes.

Q. Was it for that reason that he had the money with him?

A. Yes.

Q. All right. Are you sure that he didn't give you any of the money?

[20] A. I am positive he didn't give me nothing but $15, sir.

Q. He didn't give it to you to keep for the trip?

A. No. I asked him to, and he said he would keep it himself.

Q. Did there come a time when you went to Buddies Tourist Home after this incident?

A. I went to Buddies Tourist Home afterwards before my husband was buried.

Q. All right. At that time you spoke with some of the people who worked there?

A. Yes, I did.

Q. You spoke with the person who owned it who goes by the name of Mr. Buddy?

A. I wouldn't know, sir.

Q. Does the name Lawrence Smith mean anything to you?

A. I didn't ask any of the gentlemen their names. There was three gentlemen there.

Q. Isn't it a fact that you told those gentlemen that your husband did in fact carry a knife and that he would use it?

A. No, I did not.

Q. You don't recall making that statement?

A. I didn't make that statement at all.

Q. All right. Now, you didn't see the actual incident, [21] did you?

A. No, I did not.

Q. And you have no firsthand knowledge of what happened in that room?

A. I do not.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mrs. Sewell, when you first were interviewed by the police about a week or so after the killing, did they ask you anything about money?

A. No, he did not.

Q. Mrs. Sewell, did you receive any money from George Washington Hospital?

A. Yes, I did.

Q. What was that money that you received from the hospital?

A. $2,000.

MR. CLARKE: I have no further questions, Your Honor.

RECROSS EXAMINATION

BY MR. GASTON:

Q. When was it you received that money, Mrs. Sewell?

A. It was in November.

Q. Following this incident?

[22] A. Yes, it was his life insurance they paid off. I also picked up a check of his the following pay day for, I think it was $23 or $34, something like that.

MR. GASTON: I have no other questions, Your Honor.

MR. CLARKE: I have no further questions, Your Honor.

THE COURT: You may step down.

(The witness steps down.)

MR. CLARKE: Your Honor, may I have the Court's indulgence for a second.

Your Honor, I at this time, with the Court's permission, I would like to announce a stipulation.

THE COURT: Very well.

MR. CLARKE: The stipulation will be as follows, Your Honor: It is agreed between the defense and the Government that if Evelyn B. Thomason were called to testify, she would testify as follows: That she is employed by George Washington University Hospital. That she

has care, custody, and control over employment records. And those records would show that on September 24, 1971, James T. Sewell was given a check from George Washington University in the amount of $143.13. And that check would show that it was endorsed by James T. Sewell.

At this time, Your Honor, I would ask that this item [23] be marked as Government Exhibit Number Eight for identification. I will show it to counsel.

THE DEPUTY CLERK: Government Exhibit Number Eight marked for identification.

(Government Exhibit Number Eight was marked for identification.)

MR. CLARKE: A further part of the stipulation, Your Honor, is that Government Exhibit Number Eight is a true and accurate copy of the check that George Washington University made out to James T. Sewell on September 24, 1971.

(Government Exhibit Number Eight was received in evidence.)

THE COURT: That is a stipulation, ladies and gentlemen. In other words, there is no other evidence needed about that fact. He got this check from George Washington University in the amount of $143.13 on September 24, 1971, and the check was endorsed by him, and that is a true and accurate copy of that check.

MR. CLARKE: With the Court's permission, the Government will call Lawrence Eugene Smith.

While Mr. Smith is coming in, Your Honor, I would ask that this item be marked as Government Exhibit Number Nine for identification.

THE DEPUTY CLERK: Government Exhibit Number Nine marked for identification.

[24] (Government Exhibit Number Nine was marked for identification.)

Whereupon,

LAWRENCE E. SMITH

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. With the Court's permission, will you please state your name, sir.
A. Lawrence Eugene Smith.
Q. Where are you employed at the present time, Mr. Smith?
A. Buddies Tourist Home.
Q. You have to speak up.
A. Buddies Tourist Home.
Q. Going back, Mr. Smith, to September 24, 1971, a Friday, where were you employed on that day?
A. Buddies Tourist Home.
Q. What type of occupation, position, did you have at that time?
A. Sir?
Q. What did you do at Buddies?
A. Well, I was an all around man—clerk, painter—a little bit of everything.
[25] Q. Going back to that day, September 24, 1971, did you have an occasion to see anyone at Buddies that you now see today.
A. Yes, sir.
Q. Who is that, sir?
A. The young lady over there.
Q. Will you please point her out and tell us what she is wearing.
A. Over there.
Q. What is she wearing?
A. Today?
Q. Yes.
A. A brown dress.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed and described the dress of the defendant.
THE COURT: It may.

BY MR. CLARKE:

Q. About what time was it in the day or night that you saw the defendant?
A. About four thirty.
Q. In the day or night?
A. Four thirty in the evening.
Q. Can you tell us under what circumstances you saw her?
[26] A. Her and a gentleman came in together.
Q. What did they do?
A. They registered the card for a room.
Q. They registered, is that correct?
A. Yes, sir, the gentleman registered a card.
Q. What did they do after they registered?
A. They went to the room.
Q. What room did they go to?
A. Room number two.
Q. Do you know how they got to that room?
A. I took them around to the room myself.
Q. Now, Mr. Smith, I would ask that you take a look in a second at an item.
THE COURT: I think you are going to have to shove that around so the defendant and her lawyer can see it.

BY MR. CLARKE:

Q. Mr. Smith, can you see that particular item from where you are?
A. Yes, sir.
Q. Let me move it back a little bit. Can you identify that, sir?
A. Yes, sir. That is the room number two right there.
Q. What is in room number two?
A. A sink, a dresser on one corner by the window, and then you have the bed. In relation to the bed you have [27] another, a table.

Q. Is there a bath room in that room?
A. No, sir.
Q. Where is the bath room?
A. The bath room is next door near the telephone booth.
Q. How do you get into the bath room?
A. You can come out of the room right into the bath room.
Q. Can you get to the bath room from the room itself?
A. No, you can't.
Q. In other words, you have to go outside?
A. Yes, you do.
Q. What type of locks do you have on the doors to the rooms?
A. It is not a spring lock. It's a heavy duty lock.
Q. It is one which closes automatically and locks automatically?
A. No, it don't. You have to lock it from the inside.

MR. CLARKE: At this time I would ask that this be marked as Government Exhibit Number Ten for identification. I will show it to the defense counsel.

THE DEPUTY CLERK: Government Exhibit Number Ten marked for identification.

(Government Exhibit Number Ten [28] was marked for identification.)

BY MR. CLARKE:

Q. Mr. Smith, going back to that time when they came in, will you please indicate exactly what took place when they came in to sign in the card.
A. They came in and signed. I spoke to them as they came in, I said "How are you all doing?" They signed the card.
Q. What did they sign the card as?
A. Mr. and Mrs.
Q. Was there any particular charge?
A. $4.00.
Q. How was that paid, do you know?
A. Four one dollar bills.

Q. Do you know where the man got the money?
A. From out of his pocket.
Q. Did you see if he had anything else at that time?
A. No, I didn't.
Q. What happened after the bill was paid?
A. I directed them to the room.
Q. This was room number 2?
A. Room number 2.
Q. At this time I would like to show you what has been marked as Government Exhibit Number Ten. Will you please take a look at that particular item.
[29] Q. Can you identify it, sir?
A. Yes. My initials are at the bottom of it. It is my handwriting.
Q. What do you identify it as?
A. Sir?
Q. What do you identify it as?
A. As a register card.
Q. What name is it in?
A. Mr. and Mrs. James Johnson.
Q. Is that the register card used by the individuals in this case, the defendant and the man with her?
A. Yes, sir.
Q. Mr. Smith, can you tell us what happened, if anything, after they went to the room? What time, first of all, does the card reflect that they rented that room?
A. Repeat that, please.
Q. What time does the card show?
A. 4:30.
Q. In the evening?
A. 4:30 p.m.
Q. Did anything happen later on?
A. I heard someone screaming later on.
Q. About how long after they went into the room, you showed them to the room, would you say it was?
A. About a quarter to five.
[30] Q. About fifteen minutes later?
A. About fifteen minutes later.
Q. Can you tell us where you were, who you were with, and what happened?

A. I was in room 14 with Mr. Henderson and Mr. Griffin at the time.

Q. Is that Mr. Thomas Henderson and Mr. Sherman Griffin?

A. Yes. I was sitting there talking for about fifteen minutes, we sat there for about that long, and then I heard a scream and I heard somebody holler "help" just like that.

Q. Were you able to tell whether it was a male or a female voice?

A. It was a female voice. You can distinguish the difference between a female voice, whether it was heavy or light.

Q. In your opinion, it was a female voice?

A. It was a female voice.

Q. Then what happened, sir?

A. I came to the center hallway which was on the 1320 side, and I came to the circle hallway and I told Mr. Henderson to come on, and we stood there to try to find the direction where it came from. And when we found out where it came from—

Q. Did you hear it again, sir?

A. Sir?

Q. Did you hear any more noise?

[31] A. Yes, sir. She was still hollering "help".

Q. This was the female voice?

A. A female voice.

Q. Then what happened?

A. We went around by the office where it was and, number 2, and me and Mr. Henderson, after we got there, I knocked on the door and I didn't get no reply. The only reply I got was "help". And we stood there for about ten seconds. I didn't get no reply, so I just kicked the door open.

Q. When you kicked the door, what if anything happened?

A. Sir?

Q. What happened when you kicked the door open?

A. When I kicked the door open, the gentleman was laying over the top of the lady trying to push a knife into her chest.

MR. CLARKE: Now, Mr. Smith, I would ask at this time that you come down here and take a look at Government Exhibit Number Nine for identification.

(Witness goes to the blackboard.)

MR. CLARKE: Now, standing over there, take the pointer and this microphone.

BY MR. CLARKE:

Q. Keeping this red pen available, will you please, first of all, just indicate where the doorway is into the room?

A. Right here.

[32] Q. Now, where were you when you first heard the scream, where abouts, in that drawing would you have been?

THE COURT: Hold the microphone.

THE WITNESS: You can't show it here. We have a center hallway. It is up here, coming back this way.

BY MR. CLARKE:

Q. About how many feet away would you say it is?

A. Fifteen feet.

Q. Now, once you broke down the door, where did you see the man and woman?

A. Right here. She was hanging over the bed.

Q. Now, you are indicating facing the bed it would be the right side of the bed near the wall?

A. Right here, yes sir.

Q. She was what?

A. She was hanging off the bed and he was on top of her with the knife.

Q. Was she on her stomach or on her back or side?

A. She was on her back with one leg hanging off the bed.

Q. Where was he?

A. Over the top of her trying to push the knife into her chest.

Q. Will you please take the red pen and just mark with an X on that diagram where it was you saw both of them.

[33] A. Right here.

Q. A little larger.
A. Yes.
Q. Now, what did you do when you saw this?
A. I went—
Q. Try to speak into the microphone.
A. I went in and I grabbed them. I grabbed the blade of the knife from him and I pulled him off the lady. We struggled all the way back to here where the police found that on the floor right there.
Q. Indicating on the floor area?
A. Yes.
Q. Mark that area with a little 1. Why don't we do it this way. Use a zero, because that will distinguish it.
A. Okay. After I got the knife out of his hand, which was lying on the floor at the time, I took the knife and put it on top of the telephone booth right here. Then I went into the telephone booth and called the operator and told her to connect me with the Rescue Squad and the Police Depatment.

MR. CLARKE: Mr. Smith, you can take the stand again.

(Witness resumes the stand.)

MR. CLARKE: At this time, Your Honor, I would ask that this item be marked as Government Exhibit Number Eleven for identification, number twelve and number thirteen.

[34] THE DEPUTY CLERK: Government Exhibit Numbers Eleven, Twelve, and Thirteen marked for identification.

(Government Exhibit Numbers Eleven, Twelve and Thirteen were marked for identification.)

BY MR. CLARKE:

Q. Mr. Smith, I would like to show you at this time what has been marked for identification as Government Exhibit Number Eleven. Will you please take a look at that.
A. Yes, sir.

Q. Can you identify that particular item?
A. Yes, sir.
Q. What do you identify it as?
A. This was the knife I took from the gentleman and put it on top of the telephone booth.
Q. At this time I would like to show you what has been marked for identification as Government Exhibit Number Twelve.
A. That belongs to it, too.
Q. Can you identify that?
A. Yes, sir.
Q. What is it?
A. It's a knife we have around the tourist home. We have a lot of them. We use them to cut up meat and stuff. We have a little kitchen back there.
Q. Do you know where that particular knife was [35] located?
A. It was on the top of the telephone booth.
Q. Was that there the time you placed that knife, Government Exhibit Eleven, on the telephone booth?
A. It was there at the time. They found it up there.
Q. I would like to show you now what has been marked as Government Exhibit Number Twelve. Can you identify that item?
A. Well, the police say they found it in the room.
Q. My question is can you identify that?
A. No, I can't identify it, sir.
Q. Did you see that on that day?
A. Later on when the police brought it out of the room.
Q. Did you see it on top of the telephone or any place?
A. No, sir.
Q. Now, Mr. Smith, when you first saw the individual who came with the man who was in the room, the defendant in this case, did you see what she was wearing?
A. Yes, sir; a blue blouse.
Q. Will you please describe what she was wearing at that time?
A. A blue blouse, a pair of dungarees and a pair of tennis shoes, blue and white stripes.

Q. What kind of shoes?
A. Tennis shoes.
[36] Q. Continue.
A. Blue with white stripes around them.
Q. When you went into the room and this woman was screaming, did you see what she was wearing at that time?
A. She had on panties and a bra.
Q. Did you see if she had any shoes on at that time?
A. No, sir.
Q. You didn't see or you don't know?
A. I didn't see.
Q. Now, can you describe what the man was wearing when he was inside the room when you broke in?
A. He didn't have no shirt on; he didn't have no shoes on. He had pants on.
Q. Just a pair of pants?
A. A pair of pants.
Q. Did you see if there was any blood or anything when you came into the room?
A. There was a lot of blood.
Q. Did you see any on the man?
A. All I seen was a lot of blood.
Q. Did you notice if the man himself had any blood on him?
A. No, I didn't.
Q. What about the woman?
A. No, I didn't pay no mind.
[37] Q. What happened to the woman after you got in and took the man off of her?
A. I came out and made a telephone call and called the police.
Q. Let me ask you this: When you came out to call the police, was she still in the room?
A. Yes, sir, at present.
Q. Excuse me?
A. At the present, I believe so, when I came out and put the knife on the telephone booth.
Q. What happened then?
A. At that time I heard the doorbell ring.

Q. When you say you heard the doorbell ring, exactly what do you mean?
A. In other words, we have two buzzers. One will ring when somebody is going out and it will ring if somebody wants to come in.
Q. They are different sounds?
A. Yes, they are different sounds.
Q. What sound did you hear then?
A. Somebody going out.
THE COURT: Going out where? What door?
THE WITNESS: Out the 1320 side.

BY MR. CLARKE:

Q. That is the same side this room was on?
[38] A. No, sir. This is up on the 1322 side.
THE COURT: I think you better explain that to the jury.

BY MR. CLARKE:

Q. How many entrances are there to or from this building.
A. We have two entrances, but we don't use one entrance.
Q. Where are the two entrances?
A. We got one on the 1322 side and one on the 1320 side.
Q. Which side do you use?
A. We use the 1320 side for entrance.
Q. Is that the side where you heard the buzzer ring?
A. That is the only one that has the buzzer.
MR. CLARKE: Now, Mr. Smith, I would ask at this time that you step down and come over to where I am. Now, at this time I would ask that you take Government Exhibit Number Eleven and stand over here so everyone can see.

(Witness goes to the blackboard.)

MR. CLARKE: Take Government Exhibit Number Eleven and use your hands as if you were the woman that you saw on the bed. How was she holding that knife, and use my hands as the man who was on top.

THE WITNESS: Well, I took the knife from the man's hands like this.

[39] (Indicating)

BY MR. CLARKE:

Q. Mr. Smith, will you please indicate exactly what you saw when you got to the bed, how did it appear to you at that time?

A. At the time? I don't understand.

Q. How did the hand appear to you.

A. Well, it appeared—

Q. Take this as the knife and please indicate how it was—you being the girl and myself being the man.

A. Well, it had to be—

Q. Not how it had to be. What you saw.

A. You are the man and I am the girl?

Q How is the knife pointing?

A. Pointing at the woman. She was trying to get back up this way and stop it coming into her chest.

Q. Now, where was the man on the woman? Was he directly over her?

A. Yes, he was over her.

Q. Now, directly, indicating this to be the bed, just like this, directly over her?

A. She was hanging off the bed, one leg off the bed, one leg on the bed.

Q. Where were his legs when he was over her?

A. He was on the bed.

[40] Q. Where were his legs? Pointing which way?

A. Just like this.

Q. Try to speak up loudly so we can hear.

A. Pointing back this way. His head would be this way at the head of the bed.

MR. CLARKE: You may take a seat again, sir.

(Witness resumes the stand.)

MR. CLARKE: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. GASTON:

Q. Mr. Smith, when Miss Agurs and Mr. Sewell came into the tourist home, who was it that filled out that card that you identified before?

A. The gentleman.

Q. The gentleman did?

A. Yes, sir. They have to fill it out.

Q. He completed the whole form, did he not?

A. Yes, sir, except for the bottom part of it where I completed it with my initials and everything on the bottom.

Q. Now, when you went into the room after this incident occurred, was there any evidence of a struggle that might have occurred between the people who were in the room?

A. All I saw was a lot of blood.

THE COURT: Where did you see the blood?

[41] THE WITNESS: On the floor, the bed and the wall.

MR. GASTON: Will you come down here and tell the ladies and gentlemen of the jury the various areas where you saw blood.

(Witness goes to the blackboard.)

THE WITNESS: Here and here and all over the bed and along side of the wall here, and on this side of the wall.

MR. GASTON: Your Honor, could the witness take a pen or something and mark it so the record is clear.

THE WITNESS: On this side here, the wall here and the floor and on the bed.

(Indicating).

MR. GASTON: While you are here, Mr. Smith, can I get you to draw on this paper a floor plan of the first floor of the tourist home showing the location of this particular room in relation to the location where the sign-in desk is and the hallway that leads to it.

THE WITNESS: Here is the hallway coming down. Here is the office here. Here is room number 2, the bath room and the telephone.

MR. GASTON:

Q. Wait a minute. Try and do it a little more clearly so the ladies and the gentlemen of the jury can identify the rooms. In other words, make each room a square. What is that?

A. This is the 1322 side. Here is the hall.

[42] MR. GASTON: You have to speak up.

THE COURT: Let him draw it and then describe it for us. You draw it and then when you are through drawing, stand back and take the pointer and describe it to the jury.

MR. GASTON: Take your time.

THE WITNESS: This is the hall.

MR. GASTON:

Q. Where is the front door?

A. The front door is right here by room 14.

Q. Was that where they came in?

A. They came in through here.

Q. Where is the sign-in desk?

A. In the center hallway right here.

Q. How would they get from the front door to the desk?

A. They come in and come down this hallway, come in the front door right here.

Q. Draw a path, if you would, please.

A. (Witness indicates on diagram.)

Q. From the desk where did they go, where does the path go?

A. From here they come from the desk and into room number 2 right here.

Q. Now, you stated you were at the desk when they came in. Where were you when you heard the screams?

A. In room 14 here.

[43] Q. In room 14?

A. Right.

Q. Approximately how far here is room 14 from room 2?

A. About fifteen feet.

Q. What were you doing in room 14?

A. Sitting there talking.

Q. Can you recall approximately how many screams for help that you heard?

A. No, sir, I couldn't.

Q. Can you give an approximation? Was it five, ten, twenty?

A. It could have been five, it could have been ten.

Q. In the area of five or ten?

A. It could have been.

THE COURT: Are you through with him at the board?

MR. GASTON: Yes, I am. You can return.

THE COURT: Return to the stand again.

(Witness resumes the stand.)

MR. CLARKE: May that diagram be marked as defendant exhibit Number One.

THE COURT: Very well.

THE DEPUTY CLERK: Defendant Exhibit Number One marked for identification.

(Defendant Exhibit Number One was marked for identification.)

[44] BY MR. GASTON:

Q. Now, you identified a sheath that counsel for the Government showed you, a knife sheath.

THE COURT: That's not so.

THE WITNESS: Sir?

THE COURT: He withdraws the question. Do you want to rephrase the question. Did you hear his testimony, counsel?

MR. GASTON: All right.

BY MR. GASTON:

Q. There came a time you picked up the knife—correct?

A. Yes, sir.

Q. Did you ever see the container which held that knife?

A. No, sir.

Q. You never did?

A. No, sir.

THE COURT: You saw it after the police showed it to you, did you not?

THE WITNESS: After the police showed it to me, yes, sir; not before.

BY MR. GASTON:

Q. Did you see where the police got it from?

A. No, I didn't.

Q. Now, how long was your struggle with Mr. Sewell over [45] the knife?

A. I guess it took about ten or fifteen seconds.

Q. Was anyone else involved in that struggle with Mr. Sewell?

A. Mr. Griffin.

Q. Mr. Griffin?

A. And Mr. Henderson.

Q. Did he get involved in it, also?

A. Yes.

Q. So it took all three of you that length of time to get the knife from him?

A. Yes, sir.

Q. Did there come a time when Mrs. Sewell came to the tourist home?

A. She came there once.

Q. Did she talk at all about a knife that her husband may have had?

A. She told me that her husband would use a knife.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Smith, when you say you were struggling for this knife, exactly what do you mean?

A. I had the knife—in other words, I had my hand on the knife because I cut my hand trying to take the knife from [46] him.

Q. What was he doing?

A. He was still clutching to the knife.

Q. Was he saying anything or doing anything?

A. He wasn't saying nothing. He just wouldn't turn the knife loose.

Q. How did you finally get it from his hands?

A. Mr. Griffin and I twisted it out of his hands. Then when I got it, I took it and put it on top of the telephone booth.

Q. When you were twisting it out of his hand, where was the defendant at that time?

A. I think she was still on the bed at the time. She never did come down. I didn't see her go out of the door, actually.

Q. Out which door?

A. Out the 1320 side.

Q. Did you see her go out of the room number 2?

A. No, sir.

MR. CLARKE: I have no further questions.

THE COURT: Did you ever hear a man's voice come out of that room at all?

THE WITNESS: No, sir.

THE COURT: So far as you know, he never uttered a sound?

[47] THE WITNESS: No, sir.

THE COURT: Any further questions?

MR. GASTON: No further questions, Your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Do you wish to have the witness excused?

MR. CLARKE: Yes, Your Honor, I would ask that the witness be excused at this point.

MR. GASTON: I would like to have him remain on call, Your Honor, if I could. I may want to use him in my case.

THE COURT: Very well. You will be on telep' one call, Mr. Smith.

(Witness excused.)

THE COURT: Now, ladies and gentlemen, I know you would like to work longer today, but I think we are going to call it quits. We have to for several reasons—first of all, you are going to find out that it is a lot harder to sit and listen to somebody talk all day than you ever believed.

Second'y, we have other things that have to be done besides the trial of this case, and we have got to have some daylight hours to do it because we have personnel that have a right to a decent working day, as well as the judges need some time.

[48] So we are going to adjourn at 4:30. I would ask you to remember not to discuss any of this evidence among yourselves or with anyone else. Have a pleasant evening, and return at 9:30 tomorrow morning. You will reassemble in the jury room and, hopefully, we can start at 9:30 or a few minutes thereafter. I may have some preliminary matters in other cases that will delay us, but we can't predict with great precision.

But if you are ready and all of the other people are ready and everything falls into place, we should be able to proceed with this trial with some dispatch.

Another thing to remember during the course of the month: This is not a Ford assembly line where you have got buttons to push and everything falls in place. We are dealing with human beings. We are dealing with human beings, and we cannot run it like you would run some factory, and there may be five or ten minutes leeway and there may be times when you don't know what is happening, but there is nobody sleeping, believe me.

All right. Good night.

(Whereupon, at 4:30 p.m. the trial was adjourned to reconvene Thursday, July 6, 1972.)

[49]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Thursday, July 6, 1972
Washington, D.C.

Trial resumed before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

[50]

CONTENTS

Witness	Direct	Cross	Redirect
Thomas O. Henderson	57	65	68
Lawrence R. Kennedy	70	76	
Joseph C. Quantrille	77	81	82
William J. Brownlee	89	102	
Sherman C. Griffin	110	118	118
Robert E. Laughery	120	135	
Stanley E. Alexander	135	139	
Jane Brazier	142	147	149

Exhibit	Identified	Admitted Into Evidence
Government No. 14	80	
" No. 15	88	89
" No. 16	100	
" Nos. 17A-17G	122	
" No. 18	129	
" Nos. 1-14, 16, 18		156

[51] PROCEEDINGS

(The trial resumed at 10:10 a.m., the defendant being present.)

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

THE COURT: Are you ready, counsel?

MR. CLARKE: Yes, Your Honor, the Government is ready.

MR. GASTON: Yes, Your Honor, the defense is ready. I have one matter which I would like to bring before the Court prior to bringing the jury out, if I may.

Yesterday in chambers, informally, I brought to the attention of the Court the matter which Mr. Clarke had brought to my attention yesterday involving a Brady question about two witnesses who neither he nor I have been able to locate who his police officer witness has indicated would testify that the decedent was accustomed to wearing the kind of knife involved here.

I have continued to try and contact those people and have been unsuccessful, and haven't heard anything contrary from Mr. Clarke and I assume he has been unsuccessful, also.

I also indicated in chambers that I didn't recall Mr. Clarke advising me of what these witnesses would testify to during discovery procedures earlier in the case. I have gone over my file and checked my notes on the conversations I had [52] with Mr. Clarke, and I could find no such indication in those notes.

Also, it was my impression that when Mr. Clarke told me yesterday about this matter, that it had come to his knowledge just from talking to a police officer, something of that nature. But, of course, I don't know about that.

But at any rate, as far as I know, and as far as my recollection serves me, this matter was first brought to my attention yesterday.

Other than that, there was some indication in the Grand Jury Minutes which I received on Friday that the brother, one of the witnesses I am discussing, might have been of some assistance, and it was then that I tried to reach him by phone.

Now, I have prepared, if Your Honor would go along with me, a subpoena for their appearance to come here forthwith. Frankly, I don't know how much good it would do in light of the fact that neither Mr. Clarke nor I have been able to reach them at their residence phone number. If I am unable to have them come here, I think that I would be entitled to have a stipulation from the Government that they would so testify, and I would ask that I receive that stipulation.

MR. CLARKE: Your Honor, the Government would object to that last part. I still don't know exactly what the facts are in this case. I do know I spoke to the brother and I did [53] not speak to the brother's wife, but I had personally spoken to the brother back in January or February of 1972. At that time the brother mentioned to me that his brother, the decedent in this case, did have and normally carried with him a hunting knife in a sheath.

However, first of all, I don't see what, really, what matter it makes in this case or what difference it makes in this case to whose knife that was. It was either the defendant's or the decedent's knife and it doesn't matter whose.

Secondly, I don't know if that is exactly what the brother would testify to if it did come down to trial.

Of course, there has been an insurance fight between himself and the decedent's wife as to who should receive in insurance in this case. I don't know where the truth lies, so I couldn't stipulate to the fact that that is what he would testify if he was called down and testified in this case.

I could stipulate that that is what he told me before. But, again, it comes down to the fact that I don't see the relevancy, really, or the materiality as to whose knife it was.

Now, as to whether or not I told Mr. Gaston about this, I would just like to mention for the record, Your Honor, that back in January and February of 1972, the defense counsel [54] and myself had an extensive discussion about this case.

At that time the defense counsel was the one who told me that the knife was the decedent's knife. Then I had my discussions with the witnesses, and I heard from the brother, that he said that was true.

So I told Mr. Gaston, I said: "Yes, what you told me seems to be the fact, that the knife was the decedent's knife."

I cannot say specifically I mentioned the brother as being the one who told me that. I believe I did, but I cannot say definitely that I did or did not.

MR. GASTON: May I be heard in response, Your Honor.

Mr. Clarke is accurate when he states that I told him that it was my information that it was the decedent's knife.

THE COURT: Where did you get the information?

MR. GASTON: The information was from double hearsay from the ultimate source which was the decedent's wife, who was now testified that she didn't say anything of the kind and that it was wrong, and it was when I presented the wife's potential testimony to Mr. Clarke yesterday in Mr. Clarke's office that he said that he later came back and told me that the police officer had said it wasn't the decedent's wife, it was the brother's wife, the brother's wife that made the comment.

[54-A] THE COURT: We are getting off on a collateral issue. I will issue the subpoena. If it is possible to serve it, very well. If not, it doesn't make any difference. It is not crucial as to whose knife it was.

MR. GASTON: Can I address myself to that point briefly. I think it is, Your Honor, because I think that what Mr. Clarke is trying to do in this case is set up sufficient circumstantial evidence to show that, in effect, Miss Agurs had this in mind all along. And if it is possible for him to argue—

THE COURT: Had what in mind?

MR. GASTON: Taking or leading this man into the tourist and then, in effect, rolling him.

THE COURT: That doesn't necessarily involve a knife.

MR. GASTON: Well, if he is able to argue that the knife is hers, it would lend support to his argument.

THE COURT: How can he argue that if there is no evidence as to it.

MR. GASTON: If there is no evidence to it, it seems to me that it is free for conjecture.

THE COURT: He can't argue anything that is not in evidence.

MR. CLARKE: Your Honor, I might also add—

THE COURT: He makes no proffer, and I have heard [55] no evidence so far that indicates that knife was in her possession at any time.

MR. GASTON: Fine, Your Honor.

THE COURT: Counsel are going to argue the evidence. I don't permit counsel to just speculate as to what might have been. What does the evidence show, what can be inferred from the evidence—that is all that he can argue.

MR. GASTON: All right, Your Honor.

THE COURT: Are these witnesses within the subpoena power of the Court?

MR. GASTON: They are in Wheaton, Maryland.

MR. CLARKE: Your Honor, I believe that is within the subpoena power of the Court. It is within—

THE COURT: Twenty-five miles.

MR. CLARKE: I believe it is 50 miles, Your Honor, for a District Court.

MR. GASTON: I think that is right, Your Honor.

THE COURT: Do you have an address that you have confirmed?

MR. GASTON: Yes, Your Honor, I obtained it from Mr. Clarke yesterday.

MR. CLARKE: Your Honor, this is the address that the witness gave me when I spoke to him. Also, the phone number that he gave me.

THE COURT: We will see if we can get the witness [56] here.

MR. GASTON: Thank you, Your Honor.

THE COURT: I will issue a subpoena.

Juror No. 9 has had death in her family, so she is not present. So we will have to seat the alternate.

MR. GASTON: All right.
THE COURT: Are we ready to proceed?
MR. CLARKE: Yes, Your Honor.
THE COURT: Have the jury come in, please.

(The jury enters the courtroom at 10:18 a.m.)

THE COURT: Now, ladies and gentlemen of the jury, unfortunately, Miss Jordan, Juror No. 9, has had death in her family. So we will have to ask Miss McCrae, Alternate No. 1, to take Juror No. 9's seat.

It has been brought to my attention that yesterday I might have created more confusion than anything else when I was talking about the stipulation and blythly told you with all of the confidence in the world that yesterday was the 6th of July. Today is the 6th of July. I guess I just got confused because we had a holiday, but today is the 6th of July, ladies and gentlemen. I can't even make it anything else if I tried.

I hope you were not confused by my error as I explained or tried to explain what a stipulation is all about.

All right. The Government is ready with its next witness.

[57] MR. CLARKE: Yes, Your Honor, with the Court's permission, the Government will call Mr. Thomas Henderson.

Whereupon,

THOMAS O. HENDERSON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Now, Mr. Henderson, speaking up as loudly as you can and into the microphone, will you please state your name for the record.

A. My name is Thomas O. Henderson.

THE COURT: They all have to hear. Everyone of those jurors must hear you.

THE WITNESS: My name is Thomas O. Henderson.
THE COURT: Thank you.

BY MR. CLARKE:

Q. Where are you employed at the present time, Mr. Henderson, where do you work?

A. I work part time at the tourist home.

Q. Is that Buddies Tourist Home?

A. That's right.

Q. Going back to September 24, 1971, a Friday last year, do you know where you were working on that date, if you were working any place?

[58] A. At the Tourist home.

Q. Same place, Buddies Tourist Home?

A. Same place.

Q. Now, on that day, that Friday, September 24th, what were your duties, what did you have to do at the tourist home, what type of work did you do?

A. Buffing and mopping, cleaning up in the rooms.

Q. Do you know where Room No. 2 is at the tourist home?

A. I do.

Q. Where is that located? First, second, third floor?

A. On the first floor.

Q. Is it any where near the main hallway?

A. Down on the corner, about two steps down the hallway.

Q. Now, Mr. Henderson, on that day, again, Friday the 24th of September, did you have an occasion, or did you go in to clean up No. 2?

A. I did that morning.

Q. About what time would you say it was?

A. It was around about 11:00.

Q. When you say cleaning up, what do you mean? When you say that, what do you mean?

A. We go in and change the linen, take the old soap out, towels, change the bed, sweep the floor, and if it needs mopping, we mop it. If it needs waxing, we wax it.

[59] Q. Now, Mr. Henderson, after someone uses a room at the tourist home, do you have anything to do with that room? Do you do anything to the room after it is used?

A. Clean it up. We have a special man that changes the bed and takes care of the bed. But I do the cleaning of the rooms, the sink, the desk, trash.

Q. Now, is that done before anyone uses the room again?

A. Before anybody goes in.

Q. Now, going back to this day, the 24th of September, did you see anything unusual in the afternoon hours? Say, something around 4:30 to a quarter of 5:00, did anything unusual happen at the tourist home?

A. There did.

Q. Can you tell us about that.

A. It was between 4:30 and 5:00, we was down in Room 14, which is around the corner from No. 2. We heard somebody screaming and hollering, about three or four times she made a noise. The three of us ran around there.

Q. What?

A. The three of us ran around to No. 2.

Q. There were three of you?

A. Yes.

Q. Who were the other two?

A. Lawrence Smith, and the other fellow, I don't know his name.

[60] Q. Sherman Griffin?

A. Sherman, that's right, and myself. He knocked on the door.

Q. Who knocked on the door?

A. Lawrence Smith knocked on the door about twice. He couldn't get in. So he just taken his right foot and busted the door, he didn't bust it down but he knocked it off the hinges, off the catch. Then we all went in. I went in last. And there was the man and the woman was scuffling.

Q. All right. Now, Mr. Henderson, once the door was opened and you went inside, what did you see when you went inside?

A. They was scuffling over the knife.

Q. Let me sort of phrase it a little bit better. Was anyone in the room when you went in?

A. Just the two, the man and the lady.

Q. Where were they?

A. They was, oh, the position they was on the bed, she was about half-way across and he was on top of her scuffling with the knife. She was under him.

Q. Now, when you went inside the room, what did you do?

A. We tried to get him off the top of her, scuffled with him trying to take the knife.

Q. Now, how was the knife positioned? Do you [61] remember?

A. May I demonstrate it?

Q. First of all, did you see them with the knife?

A. I saw them with the knife.

MR. CLARKE: Will you step down here, and taking Government Exhibit No. 11, you be the man and I will be the woman.

(The witness leaves the stand.)

BY MR. CLARKE:

Q. First all, who had their hands on the handle of the knife?

A. The lady.

Q. Will you please place my hands—see, I will act as the lady so the jury can see—will you place my hands on the knife the way the lady had her hands.

A. (Indicating.)

Q. Where did the man have his hands on the knife?

A. Down around the blade (indicating).

Q. Now, who was laying on the bed?

A. She was.

Q. Try to speak up so we can all hear you.

A. The lady was.

Q. Where was the knife pointing, if anywhere?

A. Right down between them.

Q. Between them, is that correct?

[62] A. Yes.

MR. CLARKE: Will you take the stand again.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Now, Mr. Henderson, when you went into the room, how much of the woman could you see? Let's see, now, try to keep your voice up, sir.

A. I could see her feet and her head.

Q. Excuse me?

A. He was practically covering up her body. I saw her feet.

Q. As to her feet did you notice if she had anything on her feet?

A. She had some tennis shoes on.

Q. What?

A. A pair of tennis shoes.

Q. Tennis shoes?

A. Yes.

Q. What color were they?

A. My best knowledge, I think they was white. I am not sure, but I think they was white.

Q. What about her pants, did she have any dress or pants on?

A. She had on pants.

Q. Could you see any more of her besides that?

[63] A. No. That is all I could see.

Q. What about the man?

A. He didn't have no shirt on.

Q. Did you see if he had any shoes on?

A. I didn't notice because his feet was way down to the bottom of the bed. I didn't notice that.

Q. Did you notice if there was any blood in the room when you went in?

A. Sure.

Q. Where was the blood?

A. On the bed and on the floor.

Q. What part of the floor?

A. Right in the middle part as you go in the door there.

Q. What about the man himself, did you notice if he had any blood?

A. Sure, he had blood on him.

Q. Whereabouts?

A. On his pants and all up in here. I got blood on myself.

Q. You are indicating the front part of the body?

A. That's right.

Q. What about the girl?

A. I didn't see any blood on her.

Q. Now, what happened after you got in there, did you [64] start to help them, did you say?

A. I helped them.

Q. What happened then?

A. Well, we pulled him off her, what little part was on her, and they was still tussling with the knife, so Lawrence took possession of the knife. But I left then. I didn't see no more.

Q. When you left, what did you do?

A. I ran down the street to see if I could see a policeman to get help.

Q. Now, when you left the room, were they still inside?

A. They were still inside.

Q. Who is they?

A. Lawrence and the other fellow, I have forgotten his name, that was working there at the time.

Q. Now, Mr. Henderson, when an individual goes in for a room, are they given anything?

A. Sure.

Q. What are they given, sir?

A. They are given soap and a towel.

Q. After a person leaves the room, what happens to that soap and towel?

A. We take it out and throw it away. We don't use it any more.

MR. CLARKE: I have no further questions.

[65] CROSS-EXAMINATION

BY MR. GASTON:

Q. Mr. Henderson, when you first saw the knife, was the knife pointed toward the feet of the man and the woman, or was it pointed toward either one of the upper portions of the body?

A. Upper portion of the body.

Q. Whose body was it pointed toward?
A. It had to be the lady from what I saw.
Q. Who was on top? Were these two, one body on top of the other?
A. Not all the way on top. He was laying on the side there.
Q. One body was over the other body?
A. The man's body was over the woman's body.
Q. The man's body was over the woman's body. The knife was pointed toward the woman's body?
A. That's right.
Q. Now, you heard about, how many screams did you hear before breaking in the room? Do you recall?
A. I couldn't be exact, but I guess about three or four. I couldn't be perfect about it.
Q. Was that before you broke in the door?
A. Before.
Q. Were there any screams coming while the door was [66] being broken in?
A. No, there wasn't none then.
Q. How many times did Mr. Smith have to—how did Mr. Smith break down the door?
A. He kicked it with his right foot.
Q. How many times did he kick it? Do you remember?
A. About two.
THE COURT: Could you tell whether the screams were those of a male or a female?
THE WITNESS: Male or female?
THE COURT: Did it sound like a female to you?
THE WITNESS: Yes.

BY MR. GASTON:

Q. Now, you engaged in a struggle with the decedent over the knife.
THE COURT: Do you want to rephrase that.

BY MR. GASTON:

Q. When you went in the room, Mr. Henderson, what happened? I'm sorry. Let me ask you another question. Who went in the room first?
A. Lawrence.

Q. What did he do?
A. He broke the door and then he tried to take possession of the knife.
Q. From whom?
[67] A. From both of them. Both of them had possession of the knife.
Q. All right. What happened?
A. Well, they struggled over the knife, and it wasn't long before I left.
Q. Who was involved in the struggle at first?
THE COURT: Mr. Gaston, would you come to the bench.

(At the bench:)

THE COURT: Did you hear the direct examination?
MR. GASTON: Yes, Your Honor. But what I am trying to find out—
THE COURT: Cross-examination is cross-examination, not a repetition of direct examination. You can cross-examine him on the basis of any of his direct examination. You are just repeating the questions that the Government asked. Who kicked the door down—he told you on direct examination who kicked the door down. Who went in the room first—he told you who went in the room first.
MR. GASTON: May I ask him how long the struggle was?
THE COURT: Certainly. You can ask anything that is relevant to cross-examination. Cross-examination is not the repetition of direct examination. It is not direct examination all over again.
MR. GASTON: I was just trying to bring it out in [68] more detail.
THE COURT: All right.

(In open Court.)

BY MR. GASTON:

Q. Mr. Henderson, do you recall how long you were engaged in the struggle?

A. I couldn't say. It wasn't no more than about three or four minutes. Not that long. It wasn't that long. I couldn't be exact.

Q. When you left, was the struggle still going on?

A. Sure.

Q. Were you able to actually see Mr. Smith take the knife from the decedent?

A. I wasn't there. By the time he had taken the knife out, I left.

Q. You had left?

A. I had done left.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mr. Henderson, when you entered the room, did you notice if the man was completely over the woman, partially over, or how was he on top of the woman?

A. Partially. He was over like this way and she was back down that way.

[69] MR. CLARKE: Would you step down here again. Use this as the bed. This is the bed. This would be the wall.

(At this point the witness leaves the stand and comes down to the counsel table in front of the jury.)

BY MR. CLARKE:

Q. This would be the wall. Which side would the door be on?

A. This side.

Q. What side of the bed were they on?

A. On that side.

Q. Indicating the right side.

MR. CLARKE: Why don't you step over here. Now, I will be the woman. You place me on the bed the way she was.

(At this point Mr. Clarke and the witness both lay on the counsel table in front of the jury.)

MR. CLARKE: You get on the other side. Take the knife. You be the man.

BY MR. CLARKE:

Q. Did she have both her feet on the bed?

A. On the bed.

Q. Try to keep your voice up.

A. Both feet was on the bed.

Q. Keep your voice up.

A. He was laying in this position like this. Both of them was struggling with the knife.

[70] Q. Which way was the knife?

A. That way.

Q. Try to do it like it was, if you can.

A. Like this.

Q. Try to put your hand over here a little more so the jury can see.

A. In that position is the way they were struggling like when we entered the room.

(At this point Mr. Clarke and the witness complete the physical demonstration.)

MR. CLARKE: Thank you, Mr. Henderson. I have no further questions, Your Honor.

MR. GASTON: I have no questions, Your Honor.

THE COURT: All right. You may step down, Mr. Henderson.

MR. CLARKE: Your Honor, I would ask that the witness be excused at this point.

THE COURT: He may be excused.

(Witness excused.)

MR. CLARKE: With the Court's permission, the Government will call Lawrence R. Kennedy.

Whereupon,

LAWRENCE R. KENNEDY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

[71] DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, sir.

A. Yes, sir. My name is Officer Lawrence R. Kennedy, assigned to the First District, Metropolitan Police.

Q. What is your occupation, sir?

A. Police officer.

Q. Going back to September 24, 1971, what was your occupation on that date?

A. I was assigned to Scout 12 working the 3:00 to 11:00 tour of duty.

Q. 3:00 p.m. to 11:00 p.m.?

A. That's correct.

Q. Now, on that particular day did you have an occasion to respond to 1320 5th Street, N. W., in the District of Columbia?

A. Yes, sir, I did.

Q. If you can refrain from referring to your notes, it would be good.

Now, going on to that day, can you tell us approximately what time it was in the day or night that you responded to that location?

A. I received a radio run at approximately 4:55 p.m.

Q. Was that Buddies Tourist Home that you responded to?

A. That's right, sir.

[72] Q. Can you tell us what happened if anything when you arrived there, what you saw, what happened, and so forth?

A. Yes, sir. Upon being directed to Buddies Tourist Home located at 1322 5th Street, N. W., I went to Room No., I believe it was No. 2, and observed a Negro male lying face down naked from the waist up in a pool of blood, who was later identified as the decedent.

MR. CLARKE: Officer, at this time will you step down here, please.

(Witness goes to the blackboard.)

BY MR. CLARKE:

Q. Now, taking the microphone and looking at Government Exhibit No. 9, I believe it is, 9 for identification, can you indicate first of all whether or not you can identify that particular item?

A. The map?

Q. Yes.

A. Yes, this appears to be a diagram of Room No. 2 at 1322 5th Street, N. W., Buddies Tourist Home.

Q. Where would it have been that you noticed the man lying on the floor face down?

A. Right here where the blue X is.

Q. Now, there are two blue X's on that particular diagram. Just for the record, will you indicate whether it is the blue X on the bed or the blue X there—which blue X it is?

[73] A. It's the blue X on the floor with the red circle by it, between the bed and the hallway door.

MR. CLARKE: You may take the stand, again, sir.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Now, Officer, when you arrived at that room, what if anything did you do?

A. At first, my first intention was to preserve the crime scene. I had to remove two gentlemen who were standing in the doorway from out of the room and to prevent anybody further from coming in.

Q. When you say "preserve the crime scene," can you be a little bit more detailed about that? What actually do you mean?

A. Well, I guess it would be to seal off the room from any other person that is unauthorized to be in there, to keep them out and to remove anybody that was in there at the present time, to get them out, also.

Q. Where were the two individuals that you saw near or in the room when you arrived there?

A. They were standing in the doorway.

Q. Whereabouts in the doorway? Can you indicate from where you are.

A. Where the hallway is marked, they were standing between, they were standing actually into the doorway; they [74] weren't inside the room itself. They weren't outside in the hallway. They were in between.

Q. Now, Officer, after you preserved the scene, did anyone else arrive on the scene?

A. Yes, sir, they did.

Q. Who came?

A. Sergeant Quantrille, a First District Detective, and the Mobile Crime Lab.

Q. Now, before any of these individuals arrived, did you notice if anything was done with the man who was lying on the floor face down?

A. Yes, sir. He was removed by the ambulance aid men who were on the scene when I arrived.

Q. Do you know where he was taken?

A. He was taken to Freedmen's Hospital on 7th Street.

Q. Now, Officer, after the additional police officers you have indicated arrived on the scene, did you have an occasion to recover any particular items?

A. Yes, sir, I did.

Q. Will you tell us about that.

A. Yes, sir. A Mr. Lawrence Smith, who was the desk attendant—

Q. Try to stay away from what someone told you, if you can. Do you remember recovering anything picking up any items?

[75] A. Yes.

Q. What items were they?

A. They were two knives, and I am not really sure of this, and a sheath.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 11. I would ask that you look at this item.

Can you identify it?

A. Yes, sir. This is one of the knives I removed from the top of the telephone booth in the hallway.

Q. Is that the telephone booth that is right near the bathroom?

A. Yes, sir.

Q. Was there anything else up there when you took a knife off?

A. Yes.

Q. What else?

A. A small paring knife, steak knife type.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 12. Can you identify that?

A. Yes, sir.

Q. What do you identify it as?

A. This is the knife, one of the knives I removed from the top of the telephone booth.

[76] Q. Now, you have indicated something about a sheath. Can you tell us what you remember about that?

A. I don't remember the sheath specifically being removed from the top of the telephone booth. I really don't know where that was recovered. I can't remember if I myself handled it.

Q. At this time I would like to show you Government Exhibit No. 13 for identification. I will ask you, basically, this: do you remember seeing that particular item before?

A. Yes, sir.

Q. That is the item that you said you don't know where it came from?

A. Yes, sir.

MR. CLARKE: You don't remember. May I have the Court's indulgence for a second.

I have no further questions, Your Honor.

MR. GASTON: I have just one question.

CROSS-EXAMINATION

BY MR. GASTON:

Q. I wasn't clear on the time you arrived at the scene.

A. Approximately 4:55.

MR. GASTON: Thank you. I have no further questions, Your Honor.

MR. CLARKE: Your Honor, may the officer be excused [77] at this point?

THE COURT: Yes.

(Witness excused.)

MR. CLARKE: Your Honor, may counsel approach the bench?

THE COURT: Surely.

(At the bench:)

MR. CLARKE: Your Honor, may I have the Court's permission to go out and check in the hallway, check in the witness room to see which witnesses I have available at the present time. I am expecting Dr. Brownleee at 11:00. I don't know if he is a little early.

I also have a couple of other witnesses that will be here right around 11:00 to 11:15, and I could put one of them on if Dr. Brownlee is not here at the present time.

THE COURT: Yes.

(In open Court.)

(Short pause.)

MR. CLARKE: Your Honor, the Government now calls Detective Joseph Quantrille.

Whereupon,

JOSEPH C. QUANTRILLE

was called as a witness and, having been first duly sworn was examined and testified as follows:

[78] DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, sir.
A. Joseph C. Quantrille.
Q. What is your occupation?
A. I am employed by the Metropolitan Police Department.
Q. In what capacity?
A. As a detective.

Q. For what section?
A. First District.
Q. Now, Detective Quantrille, going back to September 24, 1971, what was your occupation and assignment on that day?
A. I was assigned to the First District Detective Cruiser. I believe it was 717.
Q. Going back again, to that day, September 24, did you have an occasion to respond to a location known as Buddies Tourist Home?
A. Yes, sir, I did.
Q. About what time of the day or night do you remember first arriving there?
A. I believe it was right after 5:00.
Q. Did you have an occasion to leave Buddies Tourist Home at any time after you arrived there in relation to the case that you went there and go some place else?
A. Yes, sir, I responded to Freedmen's Hospital.
[79] Q. Try to keep your voice up. Where did you respond?
A. To Freedmen's Hospital.
Q. About what time was that?
A. I believe it was around 5:30.
Q. Can you tell us what if anything you did when you got to Freedmen't Hospital?
A. I went to Freedmen's Hospital to see how badly the complainant was hurt. I recovered some property while I was there.
Q. Can you tell us about recovering property. First of all, what is the standard operational procedure, if you want to use that word, as far as recovery of property from a hospital? What do you do?
A. Well, they take the property from him when he is admitted. And if it is a serious case, then we recover the property at that time.
Q. Will you describe in a little more detail what you mean by the property—you recover the property and they take it from him.
A. Well, he was being operated on, so they take what he was wearing off and give it to the head nurse. As I

remember, at that time we wanted to see if he had anything of value to safeguard, and things like that.

Q. What did you do when you got to the hospital about this property?

[80] A. Well, we recovered what property that they had. And we were told that this was all he had. We recovered a pair of pants and a knife.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 3, and I would ask that you look at that item.

MR. CLARKE: In the meantime, Your Honor, I would ask that this be marked as Government Exhibit No. 14 for identification.

THE DEPUTY CLERK: Government Exhibit No. 14 marked for identification.

(Government Exhibit No. 14 was marked for identification.)

MR. CLARKE: I will show it to defense counsel.

BY MR. CLARKE:

Q. Officer, going to Government Exhibit No. 3 which you have before you, for identification, can you identify that particular item?

A. Yes, sir. They are the pants that were recovered from Freedmen's Hospital.

Q. Now, when you recovered these pants, what if anything did you do with the pants?

A. I put them in, they were in a green bag, a green trash bag, a plastic bag. So I checked the pockets and found the knife in one of the pockets.

[81] Q. Did you find anything else in the pockets besides the knife?

A. No, sir.

Q. At this time I would like to show you what has been marked for identification as Government Exhibit No. 14.

Can you identify that particular item?

A. Yes, sir. I believe this is the knife I took from the pocket. I didn't mark it with my initials or anything, but I believe that is the knife.

Q. Now, what did you do with the knife and the pants after you recovered them from the hospital?

A. I responded back to the scene of the crime and turned them over to the Mobile Crime Lab.

Q. Would that be Officer Laughery of the Mobile Crime Section?

A. I believe so, sir.

Q. Officer, did you find any money in the pockets of those pants, Government Exhibit No. 3?

A. No, sir.

MR. CLARKE: I have no further questions.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, you state you didn't mark that particular knife.

A. No, I didn't.

[82] A. No, I didn't.

Q. In the usual course of your business don't you mark articles recovered?

A. Yes, sir.

Q. As a matter of fact, Officer, you have no way of knowing whether that is actually the knife that came from that pants pocket or not, do you?

A. It looks like the knife.

Q. It looks like the knife. But you can't be positive it is, can you?

A. No, sir.

MR. GASTON: No other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. How many knives that look like that did you give to Officer Laughery?

A. Just one.

MR. CLARKE: I have no further questions.

MR. GASTON: No questions, Your Honor.

MR. CLARKE: Your Honor, may the officer be excused?

THE COURT: Yes, you may be excused.

(Witness excused.)

MR CLARKE: Your Honor, may counsel approach the bench again.

[83] THE COURT: Very well.

(At the bench:)

THE COURT: You want to look for witnesses? We will take a short recess. How many more do you have?

MR. CLARKE: Officer Laughery, Dr. Brownlee, and then I have one downstairs in the cell block, Mr. Griffin. That will be it.

MR. GASTON: Are you going to have Officer Horstkamp here?

MR. CLARKE: No I know where he is. I just have him on call.

(In open Court.)

THE COURT: The next witness to testify, ladies and gentlemen, is the Deputy Medical Examiner of the District of Columbia. He was instructed to be here at 11:00. So we are going to take a short recess and he should be here. We will take a short recess.

(Short recess taken.)

THE COURT: Are we ready to proceed?

MR. CLARKE: Your Honor, the Government is ready.

MR GASTON: Your Honor, before he brings the jury out, may I bring another matter before the Court.

Your Honor, another witness in this case that I learned that the Government intends to call is Sherman Griffin, who was also an employee at the tourist home. I sometime in [84] the past—and if I had time to check my file, I could give you the exact date—I tried to contact Mr. Griffin and learned that the phone number which I phoned, he no longer lived at, and I was told he had moved out of the city. I understand the Government has him available.

I asked Mr. Clarke if I could speak with him, and Mr. Clarke said only in Mr. Clarke's presence.

I think, Your Honor, that I have a right to talk to a witness, who legally doesn't belong to either side, without the strictures of Government counsel being present. And I would ask that I be allowed to speak to Mr. Griffin alone.

MR. CLARKE: Your Honor, Mr. Griffin has been in jail since, I believe, January 1972. He is presently in the lockup behind the courtroom at the present time. He is now in the minimum security section of Occoquan and has been sent up here pursuant to a come-up from the United States Attorney's office.

The reason that I requested that counsel not talk to Mr. Griffin unless I be present with him is that there has been some problem running through, actually, two of our witnesses so far, Mr. Lawrence Smith and Mr. Henderson. Mr. Smith told me a completely different story from what he testified to at the trial, basically as to the way the knife was held and such things as that.

[85] I have already spoken to Mr. Griffin back in, I believe it was February. The police officer has spoken to him today. I just ask that basically so that I don't learn anything by surprise from the witness stand, that I be allowed to be there, too, when counsel talks to him.

I do not consider this to be in any way infringing upon counsel's ability to prepare his defense. Just as when I talk to the witness, counsel being there would not hinder that in any way, so I do not see how my being there would hinder counsel.

MR. GASTON: For one thing, I don't know how those witnesses have—now, Mr. Clarke hasn't actually claimed surprise, but all of the prior statements obtained by the police seem to be in substantial corroboration with what testimony we have heard here today.

MR. CLARKE: Your Honor, the basic difference is in two matters—whether or not they have seen this individual before. Both Mr. Smith and Mr. Henderson have told me at prior occasions that they saw the defendant in the tourist home on several different occasions in the same

type of situation, as a Mr. and Mrs., with other individuals.

This would go to the inference that on this particular occasion she was there in an act of prostitution.

The witnesses both deny that particular episode prior to the time they testified. So I did not ask them on the [86] stand.

Also, Mr. Smith changed on several matters. One is the amount of money that was paid. One time he told me that it was, in the statement it was four singles. Then another time he told me he was given a $10 bill and he gave $6 change.

But the main way he changed was to the positioning of the knife. Before, he had told me that the defendant's hands were up at the top and the other individual's hands were down on the blade of the knife. And then at the trial he changed that.

Mr. Henderson yesterday two times demonstrated that the hands were as he demonstrated in Court. And then this morning his demonstration was different until we spoke to him again, and then he, you know, said yes, he was mistaken and changed the demonstration.

THE COURT: I guess what you are going to have to do when you interview them is interview them with a tape recorder and then take a signed statement and swear them to the statement. Then when they change, indict them for perjury. That is what you are going to have to do with them.

The witness is available to you. He is available to you. You can talk with him. Mr. Clarke doesn't have to be present.

MR. GASTON: Thank you, Your Honor.

THE COURT: And Mr. Clarke will have an opportunity, [87] before he testifies, he will have an opportunity to read the perjury statute to the witness.

MR. CLARKE: Yes, Your Honor.

MR. GASTON: Yes, Your Honor.

THE COURT: Read the perjury statute to them. All we have to do is lock up some of these liars. Then it will stop.

MR. GASTON: I guess it is neither here nor there, but I can see how some of the discrepancies occur just from memory.

THE COURT: No, no. Don't be so naive, counsel. Don't be so naive. They lie with impunity, with absolute impunity. You can try this case every week for the next 52 weeks and get a different version out of it. That's this Court's experience with some of these witnesses.

You may speak with him, certainly.

MR. GASTON: Thank you, Your Honor.

MR. CLARKE: Your Honor, the Government is ready to proceed. Dr. Brownlee is here.

THE COURT: All right. Call the jury in.

MR. CLARKE: Your Honor, while the jury is coming in, may this be marked as Government Exhibit No. 15 for identification.

THE DEPUTY CLERK: Government Exhibit No. 15 marked for identification.

[88] (Government Exhibit No. 15 was marked for identification.)

(The jury enters the courtroom.)

MR. CLARKE: Before the doctor testifies, may I announce to the jury a stipulation entered into between counsel.

THE COURT: Very well.

MR. CLARKE: Your Honor, the stipulation is as follows: It is agreed between the defense and the Government that if called to testify, Mrs. Edna G. Strong would testify that she is the Director of the Medical Records Department, Freedmen's Hospital in the District of Columbia. And that as such, as part of her position, she has care, custody and control and access to the records kept in the normal and routine course of business pertaining to the patients which are treated or admitted at the hospital.

She would testify that Government Exhibit No. 15 for identification is a true and accurate copy of the records pertaining to James Sewell from December 14, 1971, at Freedmen's Hospital, the medical records pertaining to

that individual. And that she has care, custody and control and access over those records, Government Exhibit No. 15, and they are kept and made in the normal and routine course of business.

THE COURT: Is that acceptable, Mr. Gaston?

MR. GASTON: That is correct, Your Honor.

[89] MR. CLARKE: Your Honor, at this time the Government would ask that Government Exhibit No. 15 be received in evidence.

THE COURT: Any objection?

MR. GASTON: No objection.

THE COURT: All right. It will be received.

(Government Exhibit No. 15 was received in evidence.)

MR. CLARKE: The Government will call Dr. Brownlee.

Whereupon,

WILLIAM J. BROWNLEE, M. D.

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you state your name, sir.

A. Yes. Dr. William James Brownlee.

Q. Dr. Brownlee, what is your occupation at the present time?

A. I am a doctor of medicine and I am a Deputy Medical Examiner for the District of Columbia.

Q. Dr. Brownlee, would you please explain to the Court and the ladies and gentlemen of the jury what your experience has been.

A. Yes. I have a Bachelor of Science degree in [90] chemistry and a Doctorate of Medicine.

Subsequent to that I interned for one year at Freedmen's Hospital. I have had four years of surgical training in a Howard University affiliated hospital, culminating in certification by the American Board of Surgery.

Following that I was a Medical Officer and Chief Medical Officer at the District of Columbia General Hospital. In 1966, I transferred from the D. C. General Hospital to the then Coroner's Office of the District of Columbia, which has had its named changed as of February 1, 1971, to the Medical Examiner's office of the District of Columbia.

I have been there since that time.

Q. Doctor, as part of your functions as a deputy coroner and deputy medical examiner, do you ever do what is known as an autopsy?

A. I do.

Q. Will you please explain basically what that is and then what type of experience you have had in autopsies?

A. Yes. In an autopsy—

THE COURT: You are going to have to keep your voice up a little.

THE WITNESS: All right, sir.

A. (continuing) an autopsy is a procedure that is performed by doctors in the medical examiner's office on a person who has died, regardless of the type of death. It's an [91] examination of the body after death. This involves quite, without going into a lot of technical aspects, it involves several phases.

One is an external examination, where the body is examined on the outside and, also, the body is examined on the inside.

In addition to these, we do certain studies, microscopic studies, where sections of tissue are taken and slides are made of them. And we do certain chemical studies where we may take body fluids or tissues and run them for chemical analyses.

BY MR. CLARKE:

Q. Doctor, can you give us the purpose or the reason an autopsy is performed on an individual?

A. Our office is obliged by the Government of the District of Columbia, it's our obligation to examine people

who have died in the jurisdiction of the District of Columbia, to ascertain why they died.

Now, in effect, our office has the charge of insuring a person the right to die, whether he died of a natural death or whether he dies as a result of suicide, or overdose, if he is killed, did he die of drowning, did he have a heart attack—just why did he die. That is our job.

Q. Doctor, since 1966 how many autopsies have you performed, or could you estimate?

[92] A. I would say on an average I do about 400 per year.

MR. CLARKE: Your Honor, the Government would submit that Dr. Brownlee is qualified to testify as to the cause of death and autopsies.

MR. GASTON: No objection, Your Honor.

THE COURT: Very well.

BY MR. CLARKE:

Q. Dr. Brownlee, going back to September 24, September 25, 1971, did you have an occasion on either of those two days to review the remains of an individual by the name of James T. Sewell?

A. I did.

Q. At this time, Doctor, I would show you Government Exhibit No. 15 which is in evidence, which are medical records of Freedmen's Hospital pertaining to Mr. Sewell from the 24th of September, 1971. Have you had an occasion to review those particular records?

A. I have.

Q. Now, Doctor, on what day was it in September 1971 that you did perform or review the remains of Mr. Sewell?

A. The autopsy was performed on the 25th of September 1971.

Q. Can you tell us, Doctor, what findings, if any, you had in that particular case? What you did and what you observed?

[93] A. Yes. In a general description of the decedent, he was identified as being 27 years of age. He is a Negro male. He weighed approximately 150 pounds, and he was five-feet-nine-inches in height. He was very well developed and well nourished, and he had a number of wounds on his body some of which were surgical wounds, that is, created by surgeons in a hospital, and some were wounds that were inflicted prior to the surgeon's wounds.

Most of the wounds were located in the trunk of the body, that is, involving say, between the neck and the legs. There were several stab wounds and there were several cuts on the body.

I think it's best that I probably go through them and then place them for you. I am only going to list the wounds that were inflicted, not the wounds inflicted by the surgeons.

There was a wound that was in the front of the chest near the breastplate near the neck just to the right of the mid-line. This was a stab wound of his chest.

Q. Doctor, if I may interrupt you for a second, can you please tell us the difference between what you have described as a stab wound and a cut?

A. Yes. A cut and a stab wound are both incised. These wounds, meaning by that that they were inflicted by a sharp instrument. We differentiate between a stab wound and a [94] cut mainly in the direction of the inflicting object. A stab wound, a point is going into the body. And in a cut, the sharp edge of it is laying tangenital to the skin, so that one cuts in this manner and stabs in this manner (indicating.)

Q. Now, Doctor, could you continue with your description of the wounds in the chest area.

A. The wound that I have just mentioned, that is, one near the breastplate and just to the right in the front of the chest, measure three-fourths of an inch in width. There were what we call abrasive wounds, three abrasive wounds on the left side of the chest.

Now, an abrasive wound is one that is created mainly by friction, as one would notice if you rub your arm or hand or knee, say, on gravel and you notice a scraping effect. That is what we call an abrasion. We had three of those wounds. These do not go into the body. In fact, they don't go through the skin. They were on the left side of the chest.

On the right side of the chest in the front near the lower part of the rib cage was a three-inch cut or laceration.

On the opposite side, the left side of the chest, there are two wounds. One is four inches in length and the other is one-half inch in length.

Now, the four inch wound is a cut wound or laceration. The one-half inch wound was a stab wound.

So at this point we have two stab wounds—one in [95] this position and the other in this position. That is, one in the upper right side of the front of the chest and one on the left lower side of the chest (indicating.) On the abdomen or the area overlying the stomach just above the navel is a one-half inch stab wound. That is, if you take the point of your navel and go up about an inch and a half above it, you have a one and a half inch stab wound. So now we have a total of three stab wounds to the body.

As one goes to the left side of the abdomen near the navel we find another one and a half inch wound. These are all of the major stab wounds on the front of the body.

On the back we have a three-inch gaping wound, that is, a wound opening up and quite deep which is in the region of the lower back or what we call the lumbar area. It's on the right side. It's transverse. If the person were standing, it would be parallel to the floor.

And on the upper portion of his back near his neck there is a six-inch wound which goes into the skin but doesn't go through it.

Now, on his arms and hands, on the right forearm there is a two-inch cut that courses through the dermis and into the sub-cutaneous tissue. This is a fatty tissue beneath the skin. It does not go into the muscle of the arm, just through the skin and into the fatty area.

On the left hand, the third and fifth fingers on [96] the palm side are cut.

Now, in addition to the wounds that I have given you thus far, there were two significant surgical incisions. One is a hockey stick incision that courses from his right shoulder down and parallels his collar bone and comes down across his breastplate. And the other is a long mid-

line incision of the abdomen. These were created by surgeons at the hospital.

Now, if one goes into taking the stab wounds and the wounds inflicted on the outer surface and projecting what was found on the inside—

Q. Doctor, if I may interrupt you a second before you go into the internal examination, can you go back a second to the wounds you noticed on the arms and hands.

A. Yes.

Q. In your experience as a coroner, deputy coroner and medical examiner, have you noticed wounds similar to that before?

A. Yes, we have.

Q. Is there any particular pattern that these wounds take?

A. Most wounds that occur either on the surface ???? (illegible!!!!!!)

[97] You can understand if somebody comes with a knife, your natural instinct is to ward that inflicting object away from you and frequently you will get cut in the areas that I mentioned, the dorsal surface of the hand or in the palm of the hand.

Q. And are the wounds that you noticed on the arms and the palms of the hand consistent with that?

A. Yes, they are.

Q. Doctor, are there also any wounds in the hands that would have been consistent with someone holding a knife, the blade of a knife?

A. Well, the wounds that cross the fingers, there is a possibility that those fingers held the knife. I can't say exactly. The only thing I can tell you is that you have sharply incised wounds in these areas.

Now, to project as to whether or not a knife was held, whether it was cut, I couldn't tell you. They inflict the same wound.

Q. Let me ask you this: would they be consistent with an individual holding a knife?

A. That's possible, yes.

Q. Would you continue with your internal stab wounds.

A. The wounds that entered the upper right chest just to the right of the breastplate, the sternum, coursed into the heart. It went through two chambers of the heart and it [98] crossed one of the main valves of the heart. This wound, when I examined it, of course, had been closed by the surgeons. This was the reason for the hockey stick incision, because they had gone in to repair the heart.

The wound that entered just above the navel went into the liver and penetrated for a depth of approximately five and a half inches from the skin surface.

Q. Doctor, can you estimate or did you measure how far in the wound that went into the heart penetrated?

A. The estimated depth of that wound from skin surface to the tricuspid valve would be approximately three and a half to four inches.

Q. Thank you.

A. The wound that entered, the stab wound that entered the left side of the chest just above the left lower rib cage, the boarder of it, entered the chest, it entered the diaphragm. The diaphragm is a layer of muscle tissue that separates the two main cavities in the body, the abdominal cavity from the thoracic or chest cavity, and this wound entered the left chest, coursed in through the diaphragm and then went into the stomach.

The stab wound in the lower right-chest that we mentioned before went through the muscle between the ribs, between the seventh and eighth rib, and also entered the diaphragm and cut the right lobe of the liver.

Now, the essential features from the interior [99] examination, and joining them with the findings of the external examination, without going into a lot of medical terminology, we came with a conclusion as to the cause of death, that the decedent died of shock which was secondary to or due to a massive bleeding from these various wounds which were due to the multiple wounds, and the principal wound being that of the heart.

Q. Doctor, at this time I wou'd like to show you what has been marked as Government Exhibit No. 11. Now, looking at that particular instrument, do you know whether or not, first of all, as to the cut wounds on the

individual's body, if that would be consistent, if the wounds would be consistent with a weapon like that?

A. It's very possible, yes.

Q. What about the stab wounds?

A. It's possible, also.

Q. Now, Doctor, if you notice, the width of that is slightly more than a half-inch. Would that still be consistent with the size of the opening on those stab wounds?

A. Do you mean can a half-inch measured stab wound on the skin surface be created by an instrument greater than one-half inch? The answer is yes.

Q. Can you please explain that.

A. The skin has elastic tissue in it. It has the capability of giving and retracting, giving and retracting. [100] One can, therefore, penetrate the skin in, say, a taut situation, or even if it is not taut, and create a wound that when the inflicting instrument is removed, the skin just contracts and you measure the distance of the skin at that particular point and it is less than what the wound is, than what the instrument is. So it's very possible that you may get a three-quarter or one inch instrument creating a half-inch wound.

MR. CLARKE: Doctor, at this time I am going to ask that you become an artist, in a sense, and if you could, step down over to this blackboard where we have a blank piece of paper, and I will give you a pen and ask if you just mark basically sort of the figure of a human being and whereabouts on the figure the wounds would have been.

(Witness goes to the blackboard.)

MR. CLARKE: Will you take this microphone and any number of pens that you wish.

Your Honor, after the doctor has marked that, I would ask that that be marked as Government Exhibit No. 16 for identification.

(Government Exhibit No. 16 was marked for identification.)

MR. CLARKE: Doctor, could you just mark above the top of that whether that is a front or a back view. I imagine it is a front view.

[101] Doctor, could you just take the pen, the blue pen, I guess, would be the easiest way to do it, and just encircle those wounds which were stab wounds as compared to cut wounds.

THE WITNESS: You don't want the incisions, do you?

MR. CLARKE: Do you mean the surgical incisions?

THE WITNESS: Yes.

MR. CLARKE: No, we don't need that.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Doctor, do you know if it is normal procedure for the Coroner's Office to have tests performed on the blood of an individual as to ethyl alcohol content?

A. Yes, we do.

Q. Was that done in this particular case?

A. Yes, it was.

Q. Is it standard procedure to make a report of that? Do you keep those on file with the Coroner's Office?

A. That's correct.

Q. What are the results in this particular case?

A. That the decedent had a blood alcohol level of 0.12 percent.

Q. Do you know what is the legal percentage for intoxication in the District?

A. It is considered 0.15 percent.

[102] Q. And this would be below that, is that correct?

A. That's correct.

MR. CLARKE: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Doctor, as to the alcohol content of the blood, do you know at what time of day the blood was examined for that purpose?

A. I don't know what time of day it was done. I know what time I took it.

Q. Excuse me?

A. I know what time I took it, but I don't know what time of day the actual examination was performed.

Q. Do you know what time you took the blood?

A. Yes.

Q. To perform the examination?

A. Yes.

Q. When was that?

A. That was done in the morning, about 11:00, on September 25, 1971.

Q. Does the hospital record, Government Exhibit No. 15, indicate anything about transfusions being given to the decedent?

A. The portion of the records that I have does not [103] reflect evidence of a transfusion. I have the doctor's progress notes and the operative report, and the emergency care report. That is the emergency room record.

Q. So you are unable to say from those reports whether there was a transfusion or not?

A. No; these records do not state whether there was or was not.

Q. All right.

A. One could presume that there was.

Q. Presume that there were transfusions?

A. Yes, surely.

Q. If there were transfusions, this would certainly diminish the percentage of alcohol content of the blood, would it not?

A. It would.

Q. Also, Doctor, isn't it true that—what was the time of death according to the records?

A. The pronouncement time was 10:30 p.m. on September 24, 1971.

Q. All right. Assuming that the alcohol was consumed prior to 4:30 p.m. on that date, isn't it also safe to say that the natural purification system of the body would diminish the percentage of alcohol in the blood at the time of death, or by the time of death?

A. You have to take into consideration that you don't [104] have a natural phenomenon occurring here. This man from his hospital records was in a state of shock for a considerable period of that time, so he doesn't have the

normal filtration system or detoxification system of alcohol system working for him.

Q. Would the system be completely shut off or would it be working to a certain extent?

A. Probably to a lesser extent, but quite a marked lesser extent.

Q. Now, Doctor, you have called, or have characterized the wounds on the hands of the decedent as being defensive. Now, is it not perfectly possible for someone to receive defensive wounds while engaged in an offensive attack?

A. I think you have to define what is defensive and what is offensive.

Q. Excuse me?

A. I think what you are looking for is a definition of offense and defense. You are asking me, in one sense, to say he is offensive, that is, receiving a defensive wound while he is being offensive.

Q. Right. Isn't that possible? That's what I am asking.

A. I don't quite understand what you are saying.

Q. In other words, isn't it possible for a person to ward off a knife defensively and still be on the attack himself?

[105] A. I think if you emperically look at what you are describing as defensive wounds, just from an empirical basis, then you have to call them defensive wounds, as I did. A person who is in an offensive position is not likely to have the palm of his hands open, nor is he likely to get cut in these positions. He gets cut in these positions in a defensive effort.

Now, what his activities were, I can't say. All I can say is that these are well defined areas which we call defensive wounds.

Q. Right. I am not arguing with the characterization of the wounds. My point is trying to establish—

THE COURT: I don't think you can make the point with the question. He has answered the question.

MR. GASTON: Well, if I may make another attempt.

THE COURT: You don't do so over the ruling of the Court, counsel.

MR. GASTON: With a rephrasing of the question, Your Honor.

THE COURT: If the jury understands and the Court understands your question, insofar as the hands and the arm wounds are concerned, he was in what you characterized medically as a defensive position?

THE WITNESS: That is correct.

THE COURT: What his position was prior to that [106] time, you have no way of telling, is that correct?

THE WITNESS: That is correct.

BY MR. GASTON:

Q. Then you mean defensive as to the knife?

THE COURT: As to whatever instrument inflicted the injury.

THE WITNESS: I mean defensive in relationship to the wounds, the wounds of the hands and the arms.

MR. GASTON: I have no other questions, Your Honor.

MR. CLARKE: I have no further questions, Your Honor. May the doctor be excused?

THE COURT: Yes, you may be excused.

(Witness excused.)

THE COURT: Do you want to come to the bench a minute, counsel.

(At the bench:)

THE COURT: Who is your next witness?

MR. CLARKE: I have Officer Laughery of the Mobile Crime Lab.

THE COURT: Who is after Laughery?

MR. CLARKE: Lieutenant Alexander, and then there is a possibility of a stipulation ending the case, or I might have to call the nurse. I will have to check.

THE COURT: About what?

MR. CLARKE: The nurse from the Department of [107] Corrections, Womens Detention Center, as to whether or not this defendant had any cuts or bruises on her when she was admitted.

THE COURT: Then we will take our recess. That should give you time to talk to this other witness.

MR. GASTON: Is he back here now?

THE COURT: Check with the marshal, Mr. Kelly.

(In open Court.)

THE COURT: Ladies and gentlemen of the jury, we are going to recess this trial until 1:45. If you can enjoy your lunch after the coroner's testimony, do so. 1:45.

(Luncheon recess taken.)

[108] AFTERNOON SESSION

(The trial resumed at 2:02 p.m., the defendant being present.)

THE COURT: Are we ready to proceed?

MR. CLARKE: Yes, Your Honor. Before we proceed, I would just like to point out one thing to the Court.

Over the luncheon recess I spoke to Mr. Griffin who is in the cell block. When Mr. Griffin was first interviewed by the police approximately two hours after this episode, he gave a statement to the police saying that he saw the way the knife was being held. The handle, as the statement goes, the handle was in the defendant's hand. The blade was in the deceased's hand.

Mr. Griffin spoke to me in my office in February when he was in jail. I called him up the week before February 18th. That would be February 11th. At that time he also told me the same story.

However, in the cell block now he tells me that it was a different way. I cannot claim surprise if he testifies on the stand as to what he told me in the cell block, since that is what he just told me at this point. However, I will seek to refresh his recollection if it appears that possibly his recollection is hazy, at this point.

I would just like to point that out to the Court before we proceed.

[109] MR. GASTON: Your Honor, I also spoke with Mr. Griffin and he told me that—he didn't tell me he could tell me which way the knife was pointing—just that

he couldn't tell, just that the two of them were grabbing.

Also, at this time, Your Honor, the reason I might want to call Officer Horstkamp which I mentioned earlier is that during the grand jury, he testified that he had a conversation with Mrs. Sewell, and that she told him that he carried a knife and that he carried it in a sheath, and that is contrary to her testimony. That would be my reason for having him here.

I would ask at this time that he be called so that he will be ready for the defense case.

THE COURT: Is he available?

MR. CLARKE: Yes, Your Honor. The detective-sergeant knows where Officer Hortskamp is at this time, and I still have him called. However, I think the witness who will be testifying, Mr. Griffin, will obviate any need to call Detective Hortskamp, because Mr. Griffin will testify that at the time Sewell registered at the motel, he noticed a sheath on the man's side. So that could obviate the problem at that point.

MR. GASTON: It could well, Your Honor.

THE COURT: All right. Have the jury come in.

(The jury enters the courtroom at 2:05 p.m.)

[110] THE COURT: Would you call your next witness, please.

MR. CLARKE: With the Court's permission, the Government will call Sherman Clarke Griffin.

Whereupon,

SHERMAN C. GRIFFIN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please speak into the microphone, sir, and keeping your voice up, will you give us your name?

A. Sherman Griffin.

Q. Mr. Griffin, try to move forward a little bit and speak into the microphone, if you can.
A. Sherman Griffin.
Q. Mr. Griffin, going back to September 24, 1971, a Friday about a year ago, do you know where you were working on that day?
A. Yes.
Q. Where was that, sir?
A. Buddies Tourist Home, N.W.
Q. Now, Mr. Griffin, going back to that day, again, did you see anyone on that day that you now see in Court?
A. Yes.
[111] Q. Who is that?
A. The defendant.
Q. Will you point her out. Try to keep your voice up.
A. The young lady there.
MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant.
THE COURT: It may.
BY MR. CLARKE:
Q. Mr. Griffin, was that the first time you have ever seen this individual before?
A. No.
Q. When had you seen her before? How many times, first of all, would you say you had seen her before that day?
A. About two or three times.
Q. Where did you see her before?
A. I have seen her at the tourist home and I have seen her, again, on the street.
Q. When you have seen her at the tourist home, was she by herself?
A. No.
Q. Was she with anyone else?
A. She was with a young man.
Q. Was that each time? How many times did you see her at the tourist home, would you say?
[112] A. About two or three times.

Q. During what year, month, or period of time, can you give us an estimate?
A. The month of August and September.
Q. Now, when you saw her those times, do you know whether or not she just walked into the tourist home or was she renting a room?
A. She came in with a young man, so I assumed she rented a room.
Q. How long were these rooms rented for?
A. Did you say how long are they rented for?
Q. Yes.
A. Well, by the day or the night or the week.
Q. Is there any lesser period of time that they can rent the rooms for?
A. Yes.
Q. What is that period of time?
A. Oh, three hours or less.
Q. Do you know how long she stayed in the room or stayed at Buddies Tourist Home on those days?
A. No, not really. Sometimes she would come in and go out in the course of an hour or three hours, and then other times, I didn't know, really.
Q. Now, Mr. Griffin, going on to this day the 24th of September, 1971, did anything unusual happen on that day to you?
[113] A. Yes.
Q. About what time was it?
A. It was in the afternoon. I couldn't say the exact time. It was in the afternoon.
Q. Can you tell us where you were at that time?
A. I was working there.
Q. Whereabouts were you working?
A. There are two parts to the building. I was on the first side of one side of the building.
Q. See if we can describe it by way of Fifth Street, and what is the other?
A. Both parts are on Fifth Street. One is, I think it is 1320, and the other part of the building is 1322.
Q. What part were you in?
A. 1320.

Q. Now, immediately prior to this time that we are speaking about and the time when you first saw this individual, the defendant, that day, was she with anyone when you first saw her on that Friday?

A. Yes.

Q. Now, the individual that she was with, this is when they were registering for the room?

A. Yes.

Q. Did you notice if he had anything on him at that time, any weapon of any sort?

[114] A. Yes, I did.

Q. What did you notice?

A. It was a Bowie Knife.

Q. Where was it?

A. In a sheath on his side.

Q. This is immediately before they registered, is that correct?

A. Yes.

Q. After they registered and went in the room, did anything unusual happen?

A. Yes.

Q. Can you tell us about that?

A. I guess about five or ten minutes after they were in the room, the young lady screamed help, and then she continued to do so until we broke into the room.

Q. When you broke in the room, what did you notice?

A. Well, I noticed she was partly on the bed and on the floor, and the young man was on top of her.

Q. Did you notice how she was dressed, if at all, when you went in there?

A. She had on a blouse and a pair of dungarees.

Q. What about on her feet?

A. She had her shoes on.

Q. Now, you indicated she had a blouse on. Do you remember the color?

[115] A. It was dark in color.

Q. Did she appear to be fully clothed to you?

A. Yes.

Q. Now, what happened after that, what about the man? Was he fully clothed?

A. No. I think his upper body was naked.

Q. Now, what did you once you entered?

A. What did I do?

Q. Once you entered the room and you saw the man and the woman, what did you do?

A. Well, Lawrence Smith and myself and another older gentleman tried to separate them.

Q. Can you tell us what did you do and what happened?

A. They were struggling and she was continually screaming "Help" when we broke into the room, and we separated them, and right after that she left out.

Q. Can you tell us how did she leave the room, what did she do?

A. She left because she was afraid to death.

Q. Did she walk out slowly?

A. No.

Q. How did she leave?

A. Well, from the time it took us to separate them until the time I looked around, she was gone.

Q. Now, Mr. Griffin, when you got into the room, were [116] you able to see a knife?

A. Yes.

Q. Where was that knife?

A. In both the defendant and the young man's hand.

Q. Do you remember today who was holding it and how that knife was being held?

A. They were both holding the knife.

Q. Do you remember how they were holding it?

A. Well, they were both holding it as though neither one of them wanted the thing used on them.

Q. Do you remember whether or not you were able to see the handle?

A. Well, as I can recall, it seems that—well, I can't, I am not really positive now because I don't know who was holding the blade or the handle, but both of them were holding the knife. I may have said previously that the lady was holding the handle and the man was holding the blade part, but it could have been either way because in our hurry to get them apart, that's all we were really trying to do.

Q. Okay. Now, Mr. Griffin, let me go back to what you were just saying then. After this incident, in about, say, two hours later, did you go down to the police station and talk to a police officer around 6:50?

A. Yes.

Q. Do you remember that police officer asking you what [117] you saw that time?

A. Yes.

Q. Do you remember telling the police officer exactly what you saw?

A. Yes.

Q. Now, were you trying to be as accurate and as truthful as you could be at that time?

A. Yes.

Q. Now, at the time you spoke to the police officer, is that the time you were speaking about when you told or said that the woman had the handle and the man had the blade?

A. I may have said that. I am quite sure I said that.

Q. And at that time you were trying to be as honest as you could?

A. Yes.

Q. And that was the best of your memory at that time?

A. Yes.

MR. CLARKE: May I have the Court's indulgence for a second.

I have no further questions.

THE COURT: Have you ever seen the man before the defendant was with?

THE WITNESS: I can't really remember ever seeing him before.

THE COURT: You may inquire.

[118] CROSS-EXAMINATION

BY MR. GASTON:

Q. Mr. Griffin, you stated that you heard some screaming?

A. Yes.

Q. Was that a male or a female?

A. Female.

Q. Did you ever hear a male voice?

A. No, I never heard it once.

Q. Had other people checked into the tourist home that day?

A. Yes.

Q. How many others?

A. Maybe two or three couples during that time. There were others after then or before then, but during the time they came in, there couldn't be over two or three couples.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Do you know if anyone else used that Room No. 2 immediately prior or before the defendant and the man went in there?

A. Yes, before they went in, sure.

Q. How long before?

A. I couldn't say definitely.

[119] Q. Do you know if it was used that day?

A. Yes, it was used that day.

Q. Do you know if it was cleaned up afterwards?

A. Yes.

Q. Now, you said that you didn't hear a male voice before you got in there, is that correct?

A. No, I didn't.

Q. Did you hear a male's voice from the room?

A. No, I said I didn't hear a male voice from that room.

Q. After you got into the room itself, did the man say anything.

A. No.

Q. Was he able to talk at all?

A. I don't know whether he was able to. He didn't.

MR. CLARKE: I have no further questions, Your Honor.

MR. GASTON: No questions, Your Honor.

THE COURT: All right. You may step down.

MR. CLARKE: Your Honor, may the witness be excused at this point?

THE COURT: Yes.

(Witness returns to the lockup.)

MR. CLARKE: The Government will now call Officer Laughery, with the Court's permission.

[120] Whereupon,

ROBERT E. LAUGHERY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, and spell your last name for the court reporter?

A. Robert E. Laughery, L-a-u-g-h-e-r-y, assigned to the Mobile Crew Lab, Metropolitan Police Department.

Q. Officer Laughery, going back to September 24, 1971, what was your assignment at that time?

A. It was Mobile Crime Lab Technician.

Q. Will you please explain to the Court and to the ladies and gentlemen of the jury exactly what the duties are of a mobile crime technician.

A. To respond to scenes of major crimes upon request of the investigator, to photograph the scene, collect physical evidence, process it, process for latent prints, preserve the evidence and send it to various bureaus, if requested.

Q. Officer, are you familiar with what preserving the crime scene means, prior to the time that you arrive there?

A. I beg your pardon?

Q. Are you familiar with what preserving the crime scene means prior to the time that you arrive there?

[121] A. The officer remaining on the scene will protect the scene until I arrive.

Q. What do you do when you first arrive on the scene after a crime scene has been preserved?

A. We photograph the scene in black and white photography and color photography.

Q. Is this before anything is moved?

A. Yes, sir.

Q. Going back to this day, the 24th of September, did you have an occasion to go to 1320 5th Street, N. W., in the District of Columbia?

A. Yes, sir.

Q. Did you go to any particular room or area in that place?

A. Yes, sir. It was a room on the first floor.

Q. Officer, going back to that day, again, can you tell us about what time it was of the day or night that you arrived there?

A. Yes, sir. I arrived on the scene at 3:30 p.m.

Q. Can you check that time again?

A. I have, on the scene from 1730 hours to—

Q. That is 1730 hours?

A. Yes, sir.

Q. What would that be—

A. I'm sorry. Five-thirty.

[122] Q. Five-thirty p.m.?

A. Yes, sir.

Q. When you arrive there, what did you do at that time?

A. We recorded the scene in photography and made a diagram, a rough chart.

THE DEPUTY CLERK: Government Exhibit 17-A through 17-G marked for identification.

(Government Exhibit Nos. 17-A through 17-G was marked for identification.)

MR. CLARKE: Your Honor, may the record reflect I am now showing them to defense counsel.

THE COURT: Very well.

BY MR. CLARKE:

Q. Officer Laughery, I am now showing you what has been marked for identification as Government Exhibit

17-A through 17-G, and I would ask, first of all, that we start with 17-A, which is the bottom one. They are all in sequence. As to Government's Exhibit 17-A, can you identify that?

A. Yes, sir. That is a photograph of nightstand against the wall.

Q. Was that nightstand located in Room No. 2 at the address that you went to on that date, the 24th?

A. Yes.

Q. Let me ask you this, Officer: How many rooms did [123] you go to on that day?

A. Just the scene itself.

Q. Was that nightstand located at the scene?

A. Yes, sir.

Q. When was that picture taken, do you know?

A. That was taken on September 14th.

Q. At the time that you went there?

A. Yes.

Q. Does that accurately depict what the area or the nightstand looked like?

A. Yes, sir, it does.

Q. Are there any items being displayed in that?

A. This is a man's wallet which I recovered from the scene, a photograph of a green shirt, and, also—

Q. Was that wallet in the same condition when you took that picture as it was when you first arrived on the scene?

A. Yes, sir. There is also a blue shirt that was on top of the stand.

Q. Going on to Government Exhibit 17-B, can you identify that particular item?

A. That's a pair of men's brown shoes.

Q. Is that a picture of the scene again?

A. Yes, sir, it is.

Q. Does that picture accurately depict what is shown in that picture as you saw it at the time you arrived on the [124] scene?

A. Yes, sir.

Q. Was anything moved in that picture before it was taken?

A. I beg your pardon?

Q. Was anything moved in that picture from the time you arrived until you took this photograph?

A. No, sir.

Q. Going on to Government Exhibit 17-C—to save time, take a look at 17-C through 17-G, the rest of the pictures you have in your hand.

Do all of those pictures accurately depict what they represent as you saw it at the time you arrived on the scene on September 24, 1971?

A. Yes, sir.

Q. Had anything shown in those pictures been moved from the time you arrived there until the time you took those pictures?

A. No, sir.

MR. CLARKE: Now, Officer, at this time I would ask that you step down and come over here to the blackboard.

(Witness goes to the blackboard.)

BY MR. CLARKE:

Q. Now, Officer, standing over here in the corner, I will give you this pointer, and, again, hand you this microphone. [125] Now, at this time would you please take a look at Government Exhibit No. 9 for identification. See if you can stand over a little bit more so there is no problem with the Court and everybody else seeing the diagram.

Will you please take a look at Government Exhibit No. 9, the diagram before you. Have you ever seen that before? The one right in front of you.

A. Yes, I have seen it before.

Q. Do you know how it was made?

A. Yes, sir. That is a reproduction of my original sketch made on the scene.

Q. Now, going to that diagram, again, Government Exhibit No. 9, and before we go to that, I would like to show you what has been marked for identification as Government Exhibit No. 1. Can you identify that particular item?

A. That is a cannister.

Q. Try to keep your voice up.

A. A cannister in which I placed the yellow metal ring from the scene that was recovered underneath the bed in the bedroom.

Q. Now, will you please place on that diagram with the green pen the No. 1 to indicate where that ring was found.

A. It was recovered under the bed approximately in this area (indicating).

Q. Place the Figure 1 there. That would be underneath [126] the bed, is that correct?

A. Yes, sir.

Q. I now show you what has been marked as Government Exhibit No. 2 for identification. Can you identify that particular item?

A. Yes, sir. That's the brown wallet that was found on the nightstand.

Q. Will you please mark that with the number 2 where that wallet was located.

A. It was located on the desk closest to the door.

Q. Contained in Government Exhibit No. 2 are certain papers. Were those papers in or around the wallet at the time you first saw it?

A. They were scattered about on the desk and a few were on the floor.

Q. Was there any money found in the wallet?

A. No, sir.

Q. Was there any money found around the wallet?

A. No, sir.

Q. Was there any money found in the whole room?

A. No, sir.

Q. Officer, I would like to show you now Government Exhibit No. 3 for identification. Can you identify that item? Try to keep your voice up.

A. Yes, sir. These were the blue slacks with the belt [127] turned over to me by the investigator.

Q. Would that be Joseph Quantrell of the First District?

A. Yes, sir.

Q. I would like to show you what has been marked as Government Exhibit No. 4 for identification. Can you identify that?

A. Yes, sir. This is the blue shirt which I recovered from the nightstand on the scene.

Q. Will you please mark on the diagram where that blue shirt was found.

A. Right here (indicating).

Q. I now show you what has been marked as Government Exhibit No. 5 for identification. Can you identify that?

A. Yes, sir.

Q. What do you identify that as?

A. It's a green undershirt. It was recovered from the nightstand on the scene.

Q. Will you please mark on the diagram where that was recovered from.

A. (Indicating.)

Q. I now show you what has been marked as Government Exhibit No. 6 for identification. Can you identify that?

A. It is a pair of undershorts.

Q. Do you know where they were recovered, if any place?

[128] A. If I may refer to my notes, sir.

Q. Yes.

A. They were also with the clothing on the nightstand.

Q. Will you please mark with the number 6 where they were recovered.

A. (Indicating.)

Q. I am now showing you what has been marked as Government Exhibit No. 7 for identification. Can you identify those items?

A. Yes, sir.

Q. What do you identify them as and where were they recovered, if any place?

A. A pair of shoes recovered from underneath the nightstand.

Q. Will you please mark with number 7 where that would be.

A. (Indicating.)

Q. Now, showing you what has been marked as Government Exhibits 11, 12 and 13 for identification, I would ask first that you take a look at Government Exhibit No. 11. Can you identify that item?

A. Yes, sir.

Q. What do you identify it as?

A. I describe it as a Bowie Knife.

Q. Did you see that before?

[129] A. Yes, sir.

Q. Where did you see it?

A. It was turned over to me on the scene by Sergeant Jenipher of the District.

Q. Do you know what it was turned over to you in?

A. A brown paper bag, sir.

Q. Was there anything else in the bag at the time it was turned over to you?

A. Yes, sir. Items marked as 12 and 13.

Q. Indicating the small knife and the sheath?

A. Yes, sir.

Q. I am now going to show you what has been marked as Government Exhibit 14 for identification. Can you identify that?

A. Yes, sir.

Q. What do you identify it as?

A. It's a pocket knife that was turned over to me by the First District investigator, along with a prophylactic.

MR. CLARKE: At this time, Your Honor, I would ask that this item be marked as Government Exhibit 18.

THE DEPUTY CLERK: Government Exhibit No. 18 marked for identification.

(Government Exhibit No. 18 was marked for identification.)

[130] BY MR. CLARKE:

Q. Now, Officer, I am just going to place here Government Exhibit No. 18 for identification, and I would ask that you don't open it up. Can you identify that?

A. May I look at it?

Q. You may. Can you identify it?

A. Yes, sir.

Q. What do you identify it as?

A. It's a cannister in which I placed a prophylactic that was recovered from the scene and placed in that cannister.

Q. Where was the prophylactic found on the scene?

A. It was recovered under the bed nearest the wall.

Q. Will you please mark with an 18 whereabouts it would be where it was found.

A. (Indicating.)

Q. Now, Officer, was that in a used or unused condition when found?

A. It was unfolded from the way in which you purchase them and it appeared to me through the strong odor that it may have been used.

MR. CLARKE: You may resume the stand.

(Witness resumes the stand.)

BY MR. CLARKE:

Q. Officer, do you know if any piece of evidence was picked up at the morgue or from the medical examiner shortly [131] after this episode?

A. Yes, sir, there was.

Q. What was that?

A. It was blood from the decedent.

Q. Do you know if anything was done with that or any other items which have been exhibited to you?

A. Yes, sir.

Q. What was that, sir?

A. I took several of the items consisting of the two knives, the sheath, the sample of blood which was turned over to me by the technician.

Q. Now, when we are talking about two knives, we actually have three here—Government Exhibits 11, 12 and 14, if can find it, for identification. Which knives are you talking about?

A. Exhibits 11 and 12, and the sheath.

Q. Indicating the Bowie knife in this hand and the little knife?

A. Yes, sir.

Q. What did you do with the four items—the two knives, the sheath and the sample of blood?

A. And, also, the white pillow case, I took them and delivered them to the FBI for a blood test.

Q. When you say blood test, what do you mean?

A. For grouping and, also, for identification of blood [132] on the—

MR. CLARKE: May I have the Court's indulgence for a second. Your Honor, may counsel approach the bench a second.

THE COURT: Surely.

(At the bench:)

MR. CLARKE: Your Honor, I have conferred with Mr. Gaston on this one point. All of this is, in a sense, hearsay, that the officer—I will ask him at this point to testify as to the results of the examination. Mr. Gaston has indicated he has no objection.

THE COURT: In relation to what?

MR. CLARKE: The grouping was found Type O. There was blood found on the hunting knife but insufficient to group. No blood was found on the sheath or on the little knife.

MR. GASTON: I have no objection.

THE COURT: All right.

(In open Court:)

BY MR. CLARKE:

Q. Officer Laughery, are you familiar with the results obtained from the FBI Laboratory as to the requests that you had made?

A. Yes, sir.

Q. Do you know whether or not they were able to group the blood, the sample blood that was given to them? [133] A. Yes, they were.

Q. What was that grouping?

A. The report indicates Type O.

Q. Do you know whether or not as to Government's Exhibit No. 11, the Bowie Knife, the FBI reported whether or not there was any blood, human blood found on that item?

A. There was on the Bowie Knife, there was blood, human blood found on it.

Q. Were they able to group that blood?

A. No, sir.

Q. Now, as to Government Exhibit No. 12 for identification, the other knife that was brought over there, do you know whether or not there was any blood or human blood found on that item?

A. The report indicated no blood on it.

Q. And as to Government Exhibit 13, the sheath.

A. No blood was found on it.

MR. CLARKE: May I have the Court's indulgence a second.

BY MR. CLARKE:

Q. Officer, do you know whether or not you saw any soap in that room?

A. Yes, I did.

MR. CLARKE: Will you please, again, step over to the blackboard and will you indicate with the letter S where it [134] was you noticed the soap.

(Witness indicates on diagram and then resumes the witness stand.)

BY MR. CLARKE:

Q. Now, Officer, I am going to show you what has been marked for identification as Government Exhibit 17-F and I would ask that you look at that item and see if you can see the soap in there?

A. No, sir, not the soap.

Q. Is there anything shown in that particular—

A. It is a soap wrapper.

Q. Where was that located?

A. That was on the window which housed the air conditioner to the right of the sink.

Q. Now, was the soap that saw on the sink, was it encased in a wrapper?

A. No, sir, it wasn't.

Q. Will you please mark on 17-F with a circle the wrapper we are talking about so the record is clear.

A. (Indicating.)

Q. Place your initials, there too.

A. (Indicating.)

MR. CLARKE: I have no further questions, Your Honor.

[135] CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, anywhere in this room did you find any after-shave lotion or deodorant?

A. No, sir.

Q. No brown paper bag containing those items?

A. No, sir.

MR. GASTON: No other questions.

MR. CLARKE: May the witness be excused at this point?

THE COURT: Very well.

(Witness excused.)

MR. CLARKE: With the Court's permission, the Government will call Detective Sergeant Alexander.

Whereupon,

STANLEY E. ALEXANDER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you state your name, sir.

A. Stanley E. Alexander.

Q. What is your occupation?

A. Detective Sergeant, Homicide Department, Washington, D. C.

[136] Q. Detective Sergeant, going back to September 25, 1971, what was your occupation at that time ?

A. Homicide investigator.

Q. Going back to that date, did you have an occasion to see anyone that you now see in Court today?

A. Yes, sir.

Q. Who is that?

A. That lady sitting at the table over there.

Q. Describe the dress she is wearing.

A. I believe it is dark brown, and black sweater.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant?

THE COURT: Very well.

BY MR. CLARKE:

Q. Now, Officer, will you please indicate about what time it was in the day or night you saw her and where did you see her?

A. Yes, sir. It was about 10:25 a.m. Saturday morning, September 25, 1971, in the Homicide office.

Q. Was she by herself?

A. No, sir.

Q. Who was she with?

A. Her husband Samuel, and, I believe, her sister Vivian.

Q. Can you please indicate when you saw Mrs. Agurs at [137] that time whether or not you had any conversation with her?

A. Yes, sir.

Q. Will you also indicate what that was, what happened, what was said, if anything?

A. Yes, sir. She was brought to my attention by Sergeant Spencer. He advised me that this was the lady that we wanted for the case in question, and would I talk to her and process her. He had already advised her of her rights and stated that she was not going to give us a statement.

Q. She was advised of her rights, is that correct?

A. Yes, sir.

Q. Then you were preparing the paper work and speaking with her, is that correct?

A. Yes, sir.

Q. What if anything did she say, and how did it come about?

A. I was typing, I believe, the police department Form 163 that we make out on people, and during the conversation she asked me was there a knife found. I stated there were two knives found. She stated there was only one. At that time her husband Samuel asked her—

MR. GASTON: Your Honor, I am going to object to this as hearsay.

THE COURT: Let's talk about what she said.

THE WITNESS: Yes, sir.

[138] There was a question asked her. She stated "He was holding it when I left."

BY MR. CLARKE:

Q. Sergeant Alexander, when an individual comes in who is a suspect, or a defendant in a homicide case, do you have any standard procedure which you utilize in order, do you look for anything in particular when a person comes in and you have an interview of someone like that and they are a suspect or a defendant in a homicide case?

A. Yes, sir.

Q. What is that, sir?

A. While we are talking to them we will look for injuries on the body, visible injuries.

Q. What do you do if you find any?

A. We will ask them, question them as to how they received them.

Q. Now, as to this particular case, did you notice any injuries upon Mrs. Agurs—her face, her arms, her hand, any item that was exposed to you, any part of her body that was exposed?

A. To the best of my knowledge sir, and after referring to my notes, I did not see any injury to Mrs. Agurs.

Q. If you had seen any injury, what would you have done besides question them about it?

A. I would have made a notation of it. What we

[139] generally do is have it brought to the attention of the Identification Section and have colored photos taken of that injury.

Q. In this case did you make any notes as to injury?

A. No, sir.

Q. Were any photographs taken?

A. No, sir. I beg your pardon—there was a photograph taken, but not of an injury. That was in the processing.

Q. That's the normal procedure—taking a photograph?

A. Yes, sir.

MR. CLARKE: I have no further questions, Your Honor.

CROSS-EXAMINATION

BY MR. GASTON:

Q. Officer, the examination you performed, was that just from the distance of talking to her?

A. Yes, sir.

Q. So underclothing or something like that, she could well have an injury?

A. We are not allowed to touch a woman, sir.

Q. So the answer to the question is no?

A. I didn't see any, no.

Q. But she might have had—

MR. CLARKE: Objection, Your Honor.

THE COURT: Sustained.

[140] BY MR. GASTON:

Q. She showed up voluntarily at the police department, did she not?

A. That is correct, sir.

MR. [GASTON: I have no other questions.

MR. CLARKE: I have no further questions, Your Honor. May the witness be excused?

THE COURT: Yes, Sergeant, you may be excused.

(Witness excused.)

MR. CLARKE: Your Honor, before I call my next witness, may counsel approach the bench for a second?

THE COURT: Very well.

MR. CLARKE: I would also add, Your Honor, that this is the last witness for the Government.

(At the bench:)

MR. CLARKE: Your Honor, my next witness is a Mrs. Brazier. She is a nurse at the Women's Detention Center, and it will be a matter of formality of introduction of records, medical records taken at the time this defendant was admitted to the Women's Detention Center.

Up until recently I felt we would have a stipulation—actually, it is the Government's own stipulation, and I see in this case that we don't have a stipulation because counsel has indicated there was a cut on one of the defendant's hands, but I had nothing to show that, so I couldn't stipulate [141] to that one fact. I called Mrs. Brazier down right before we came back to Court. So I wonder if I could have the Court's indulgence for a second just to tell her what will happen when she comes in here to testify.

THE COURT: What do you mean, what will happen?

MR. CLARKE: As to the questions I will ask her.

THE COURT: Where is she from?

MR. CLARKE: She is a nurse at the Women's Detention Center.

THE COURT: She ought to have enough sense to respond to questions without your talking to her.

MR. CLARKE: Yes, Your Honor. But I just wanted for my own benefit to know exactly what she had to say so I don't put my foot in my mouth in a sense. It would only take about a minute, Your Honor, just outside the hall.

THE COURT: Very well.

MR. GASTON: Your Honor, may I inquire of Mr. Clarke as to whether or not he intends to have the notes which she drew up admitted into evidence?

MR. CLARKE: I will ask that they be admitted. I will have to do that in order to have her testify from it. But before they go the jury, I would have them excised. The problem that we have is this, Your Honor. The defendant is a user of narcotics, and on the notes themselves there is a description of drug usage, when is the last time the person [142] took any, and how much they took. And

I will make sure that is cut off before it goes to the jury. In fact, we could do it very easily. I will have her explain what the notes refer to and I will instruct her of this beforehand to stay away from any of the narcotics.

MR. GASTON: All right.

Whereupon,

JANE BRAZIER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARKE:

Q. Will you please state your name, and spell your last name for the court reporter.

A. My name is Jane Brazier, B-r-a-z-i-e-r.

Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Brazier, going back to September 25, 1971, did you have an occasion to see anyone that you now see in Court today?

A. September 25, 1971?

Q. September 25.

A. What did you say?

Q. Did you see anyone on that day that is in Court today?

[143] A. Yes, I did see the lady that night.

Q. Will you point her out, please.

A. She is sitting over there with the black dress.

MR. CLARKE: Your Honor, may the record reflect the witness has pointed to the defendant.

THE COURT: Very well.

BY MR. CLARKE:

Q. Can you tell us where it was that you saw Mrs. Agurs?

A. I saw her downstairs in the Medical Department of the Women's Detention Center.

Q. For what purpose did you see her there, why did you see her there?

A. She was sent down from Control for medication for her heroin habit.

Q. What is your position right now?

A. Registered nurse.

Q. At that time when Mrs. Agurs came down, did you have an occasion to examine her body?

A. Yes, I did.

Q. Did you look at her arms?

A. Yes.

Q. Her face?

A. Yes.

Q. Her legs?

A. Yes.

[144] Q. At that time that you were looking at her did you notice anything of a trauma, an injury, an incision wound, a bruise of some sort, a cut—anything like that?

A. No, there weren't any.

MR. CLARKE: I have no further questions, Your Honor.

MR. GASTON: Your Honor, may we approach the bench.

(At the bench:)

MR. GASTON: Your Honor, what I was afraid might happen, obviously, has happened. I don't know exactly what the best approach to be about it. Certainly the jury being asked to disregard the statement concerning her heroin could do nothing but draw their attention to that point. It seems to me the answer that occurs to me is to have her testimony as a whole stricken.

MR. CLARKE: Your Honor, I would like to say this one thing for the record. That just before Mrs. Brazier testified, I specifically told her not to mention anything at all about drugs, anything at all about scars or anything on the woman's arm pertaining to heroin—simply for the single purpose.

Now, it's against my instructions, I had no idea that would be coming up when it came out. There is nothing else I can say on that point.

As far as counsel's request that the testimony be [145] stricken, I don't see how what the witness said inadvertently on that point in any way affects the integrity of her other testimony. In fact, it doesn't affect her integrity at all.

THE COURT: I can't see any justification for striking her testimony.

MR. GASTON: Well, Your Honor, I don't see how the potential harm could be cured. The only other alternative that does occur to me is a mistrial.

THE COURT: On what ground?

MR. GASTON: That the defendant has been prejudiced.

THE COURT: How so?

MR. GASTON: By the statement to the ladies and gentlemen of the jury that she is a heroin addict.

MR. CLARKE: We would oppose a mistrial, Your Honor, on the grounds that is a statement that came out inadvertently. I stopped immediately. There is nothing else that goes into it.

As to how much harm it will have—

THE COURT: Do you think that her addiction is irrelevant to this woman?

MR. GASTON: I think the probative value, Your Honor, is far outweighed by the prejudicial effect it might have.

THE COURT: I disagree. I am not going to declare a mistrial. I see no justification for a mistrial. I think [146] it has a great deal of probative value, as a matter of fact.

As a practical matter, here is a married woman shacked up at 4:00 in the afternoon in a third rate tourist home, and her heroin addiction, you say, has no probative value.

MR. GASTON: I think that it is far outweighed by the prejudicial value, Your Honor.

THE COURT: It was not done pursuant to any instruction of the prosecutor.

MR. GASTON: Oh, no, Your Honor, I wouldn't suggest it was.

MR. CLARKE: Your Honor, the Government position is, basically, this is, first of all, it is probative. Of course, that is the whole reason for this whole thing taking place, that is the whole reason why she went to the room with the man in the first place. That is the reason that the rolling took place.

MR. GASTON: That is an assumption.

THE COURT: Well, according to the status of the evidence, the only money he had was $4 for the room at this point. There are other inferences.

MR. CLARKE: Your Honor, an hour before—

THE COURT: Other inferences: that these employees took the money.

MR. GASTON: That's right.

[147] THE COURT: There is no evidence that they did. The other inference is that the money, if he had any money, that she took it. Either are logical inferences.

MR. GASTON: Or that he left it at his father's. He left the after-shave and deodorant some place.

THE COURT: Where is there any evidence he went to his father's place?

MR. GASTON: Mrs. Sewell testified he was going there.

THE COURT: Was there evidence that he ever went to his father's place?

MR. GASTON: There is evidence that he left her going to his father's place.

THE COURT: He was supposed to go. He was going up 7th Street and he wound up in a tourist home.

MR. CLARKE: Forty-five minutes later. That is plenty of time to—

MR. GASTON: Somewhere he left off the after-shave lotion.

THE COURT: The inference is there. I am not declaring a mistrial.

(In open Court:)

CROSS-EXAMINATION

BY MR. GASTON:

Q. Ma'am, is there a Miss Pollack at the Detention [148] Center, also?

A. Yes, there is.

Q. What does she do there?

A. She is a registered nurse there.

Q. Does she perform these type of examinations, also?

A. She does, she takes the history on them at the place where they come in.

Q. Isn't it a fact that she did talk with Mrs. Agurs at the time Mr. Agurs came in?

A. Not the night she came in.

Q. She didn't?

A. No; she wasn't on duty that night.

Q. You examined her on that night?

A. Yes, I saw her on that night.

Q. Did Miss Pollack speak to her to your knowledge at a later time?

A. Miss Pollack saw her on the 27th of September 1971.

Q. Did Mrs. Agurs register any complaints to her?

A. The only notation she mentions is that she states homicide and she was going out on bond.

Q. She didn't say anything about a pain in the back, made no notes of that?

A. There isn't any notation on that day at all.

MR. GASTON: I have no other questions.

[149] THE WITNESS: She was also seen on 9/26 over at the main jail.

BY MR. GASTON:

Q. Who did she see there?

A. Miss Hathaway, a registered nurse.

Q. Do those notations indicate any registration of complaint by Mrs. Agurs?

A. No, there is no complaint of any injury.

MR. GASTON: I have no other questions, Your Honor.

REDIRECT EXAMINATION

BY MR. CLARKE:

Q. Mrs. Brazier, if anyone complains of injuries, is it noted?

A. Yes, it is noted.

Q. Have you looked through the files in this case to see if there are any conditions of back ache, a cut hand?

A. Yes. There is no notation at all on that.

MR. CLARKE: Thank you. I have no further questions. Thank you.

Your Honor, may the witness be excused at this point?

THE COURT: Yes.

(Witness excused.)

MR. CLARKE: Your Honor, at this point the Government would move into evidence Government Exhibits 1 [150] through 14. No. 15 has already been received. And Government Exhibits 16 through 18, inclusive.

MR. GASTON: I have no objection to any of the evidence being admitted except for the pocket knife or pen knife which the officer states he can't be positive was the same one he found.

THE COURT: Your objection is overruled. They will be received.

(Government Exhibit Nos. 1 through 14 and 16 through 18 were received in evidence.)

MR. CLARKE: At this time the Government would rest its case.

THE COURT: Very well. I think we will take a short recess, ladies and gentlemen. We will take a ten-minute recess.

(Short recess taken. Following which at 3:14 p.m. the proceedings resume outside the presence of the jury.)

THE COURT: The Government has rested, Mr. Gaston.

MR. GASTON: Yes, Your Honor. Your Honor, at this time I would move for a judgment of acquittal. The

basis for my motion is that the three people who were eyewitnesses or earwitnesses, to the event, or which could provide direct evidence of what occurred, all three agree that from the inside of this room they heard screams for help. They all agreed that [151] the screams were female, and all three agreed that once the door was broken down, they saw a man and woman on the bed struggling with each other, the man on top and the woman underneath, and at that time she was still screaming.

There was also the fact that the three men went in the room. At least one or two of them went over and grabbed the decedent off the top of Mrs. Agurs and then engaged in a struggle of some duration with the decedent to remove from him his possession of the knife.

From this evidence, Your Honor, I don't see how a reasonable person could find beyond a reasonable doubt that this killing wasn't done in self-defense.

Now, I understand that Mr. Clarke has a lot of circumstantial evidence from which he wishes to build a contrary theory, but all that evidence stares in the face of the sounds that were coming from that room, the screams for help, and what was seen upon entry into that room.

I might add that all of this evidence comes directly from Government witnesses. These are the people who have firsthand knowledge of what was occurring in that room. And everything they said leads to the conclusion of self-defense.

Further, Your Honor, I would submit that for that reason I would ask that the Court find as a matter of law that the defendant is not guilty, or direct a judgment of acquittal.

Also, it occurs to me that there is no real [152] evidence of any malice involved here. So should the Court decide not to render a judgment or direct a judgment of acquittal as to the entire indictment, I do think that the defendant is entitled to relief as to second degree and have it reduced to manslaughter.

Thank you.

MR. CLARKE: Your Honor, the Government would oppose the defense motions, basically, on this factor: although at the time the witnesses entered the room, the

decedent seemed to, or according to one witness, Mr. Smith, to be the aggressor according to Mr. Henderson it looked like he had the knife itself, and Mr. Griffin wasn't sure. But even if the Court takes Mr. Smith's testimony as being the criteria or the standard of what did happen, that does not change the fact that of the two people in the room, the decedent is the one who is all cut up. He is the one who has the various slashes and stab wounds to his body.

The defendant in this case didn't have any wounds, at least none that were apparent the next day when she was at police headquarters, nor when she was down at the Women's Detention Center later on that night.

So although at the end, a man in a locked room appears to be the agressor, that does not change the fact that the wounds on the individual, plus the circumstances which led to their being there and the situation of his clothes and [153] his lack of money at the time of the breaking into the room—all indicate a contrary result, namely, that he was the victim of an attack, whether it be by way of a rolling attempt or of some kind of mad attack on the defendant's part.

But the main thing is this, Your Honor: Under the standard for a motion for a judgment of acquittal, the Government submits the jury could find, not that they have to, but that they could find that this defendant did act with malice, especially the number of stab wounds would show that, and, also, if it was the result of a rolling situation, that she acted with malice inflicting these wounds, and not in a sense of self-defense.

And one point that goes to that, Your Honor, is the fact that the decedent did not have the sheath on his belt when he was in the hospital. The belt and the trousers were sent back, and the sheath was found in the room. And it could be assumed and inferred that the knife was up with the wallet, with everything else of his when he went into the bathroom, and when he came back, the knife was used to try to get the money that he had in his pocket.

We submit, Your Honor, there is clearly evidence here for the jury to make this particular case. And under the Holland case, even though the Government's evidence does not negate all other reasonable inferences, that the jury

could find beyond a reasonable doubt from the circumstantial evidence [154] this is what happened.

We submit the case should go to the jury.

THE COURT: Do you wish to respond, Mr. Gaston?

MR. GASTON: Yes, Your Honor. Your Honor, I would suggest that in the Holland case the direct evidence which may have been contrary to the circumstantial evidence wasn't as great as the direct evidence in this case.

Also, the main thrust of my argument is that while there is some circumstantial evidence, it's not sufficient for a reasonable man to find beyond a reasonable doubt that there was not set-defense in this case. All of the direct evidence is directly on, the thrust of this is that it was self-defense.

THE COURT: Is that why she left?

MR. GASTON: The Government testimony was she left because she was scared to death. That is what Mr. Griffin said.

THE COURT: She had three men come to her rescue.

MR. GASTON: Well, the testimony and the evidence from the witnesses, Your Honor, was that she was scared to death. I can see, I think it's perfectly reasonable to see how someone in that position might have been scared to death. I think if they were not, it would be unreasonable.

THE COURT: No. The evidence does not warrant at this stage a judgment of acquittal. And with respect to malice, all of the circumstances of the killing, such as they were as [155] revealed from the evidence, as sufficient. The jury may infer malice from the nature of the wounds, the number of wounds.

I will not direct a motion for a judgment of acquittal as to second degree.

Are you ready for the defense?

MR. GASTON: Your Honor, the defense has no witnesses. I have spoken with Mrs. Agurs at some length concerning whether or not she should testify, and I have advised her against him. I would like to have it on the record that she voluntarily goes along with my advice in that regard. She has told me that she does agree not to go on the stand.

THE COURT: Is this correct, Mrs. Agurs, that you do not wish to testify in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you have a perfect right to testify?

THE DEFENDANT: Yes, sir.

THE COURT: If with the advice of counsel you do not choose to testify, you have that right, also. But it must be clear, if you want to testify, you can. I understand from Mr. Gaston you have conferred with him about that. He has given you certain advice, and you concur. You agree in the advice that he has given you. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you want to recess and [156] discuss instructions?

MR. CLARKE: Yes, Your Honor, I think it would be good to do so before argument.

THE COURT: Do you have any special instructions prepared, Mr. Gaston?

MR. GASTON: I have no special instructions, Your Honor. I do have some requests in regard to the ordinary instructions used, but I don't anticipate any problems.

THE COURT: Let's confer in chambers, and I think we can get those together in relatively short order.

MR. CLARKE: Your Honor, will the Court be having arguments today or tomorrow morning? I anticipate the Government argument will probably be about 15 minutes, since it is basically a circumstantial case.

THE COURT: I don't see why we can't get it to the jury today. I don't see any reason why we can't.

MR. CLARK: The Government is ready to argue today, Your Honor.

MR. GASTON: The defense is ready, Your Honor.

THE COURT: I think we ought to move then. All right. I will see you in chambers.

(Counsel and the Court confer in chambers from 3:25 p.m. until 3:55 p.m., when the following proceedings are had in open Court:)

THE COURT: Just have them—

[157] MR. GASTON: Your Honor, before the jury comes out, it might be a good time for me to renew my motion for a judgment of acquittal, if I indicate I don't want to say anything further. I just want to for the record.

THE COURT: Yes, and it is denied on the same grounds it was originally denied.

(The jury enters the courtroom.)

THE COURT: Ladies and gentlemen of the jury, there is no more evidence to presented to you in this case. And there remains, therefore, just two things to be done:

One, argument of counsel with respect to the evidence that has been presented, and then the Court's instruction as to the law that pertains to this case.

In view of the hour, we are going to ajourn the trial until tomorrow morning. I will ask you to return at 10:00 tomorrow morning, because I have some preliminary matters in the morning, but at 10:00 tomorrow anticipate that we will be prepared for argument of counsel and the Court's instructions on the law.

Don't discuss any of it, please. All right. Good night.

(The jury leaves the courtroom.)

THE COURT: I will see counsel now in chambers.

(Whereupon the trial was adjourned at 3:58 p.m. to reconvene Friday, July 7, 1972.)

[158] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA V. AGURS, DEFENDANT

Friday, July 7, 1972
Washington, D.C.

Trial (resumed) before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, and a jury.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT T. GASTON, Esq.
For the Defendant

[158-A]

CONTENTS

	Page
Instructions to Jury	166
Verdict	190

[159] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

(Defendant present.)

MR. CLARK: Your Honor, as far as instructions go on this case, the Government indicated yesterday it would be requesting a special instruction on the right of self-defense and the right of the individual himself to retrieve property taken from him or prevent property being taken from him. After several discussions with the Chief of the Appellate Section, the Government at this time would withdraw that request and simply ask that when the Court is discussing the general theory of self-defense itself, as to whether or not an individual is an aggressor or not, that Court just mention the fact that an individual can be an agressor if they are trying to take someone's property as well as attacking someone.

MR. GASTON: Your Honor, I would object to that instruction on the ground that there is no evidence that there was any property there. It is true that a possible inference can be made that Mr. Sewell did have property there, but that type of instruction, it seems to me turn that possible inference into a fact on which the jury is to make a decision. And if it is given, I would ask that there be some notation that the person whose property is taken is only permitted to use a certain amount of force to protect that property, and if it is [160] excessive, then he himself becomes an aggressor.

THE COURT: I am not going to get all hung up with a lot of theory. I am going to explain to this jury in plain and simple language what the theory of self-defense is as it relates to the evidence in this case. And I am quite certain that I can make them understand it and at the same time satisfy the legal requirements of both the defense and the prosecutor in this case.

MR. GASTON: I have some other matters which I would like to discuss, if I might.

I would like to inquire first if Your Honor intends to give the usual instruction No. 13 which concerns the number of witnesses?

THE COURT: No, I don't.

MR. GASTON: Fine. I would also—Mr. Clarke indicated in the chambers yesterday that he intended to argue certain matters, and rather than interrupt his final argument, I would like to object to some of the things which I anticipate he will be arguing at the time.

I believe, for instance, that his argument that Mr. Sewell went out of the room and into the bathroom solely because he had his pants on is just mere speculation. There is just no evidence of that at all.

I feel the same way about evidence that while he was gone, she was going through his papers. That's mere [161] speculation.

It is arguments of that nature to which I would like to register an objection, and I would hope that my objection could be a continuing one so I would not have to interrupt.

MR. CLARK: Your Honor, as to those two points, I would submit that the Government has a right to argue any logical inference from the evidence itself. And in this case, Diagram No. 9, Government Exhibit No. 9, shows the bathroom is out, and as the witnesses have indicated, the entrance to the bathroom is out in the hallway.

The decedent in this case had completed an act of sexual intercourse, as is evidenced from the used condom which was found in the room. And the decedent was only wearing a pair of pants; his underwear had not been placed on. And we submit that the logical inference from that is that the individual had left the room and gone out into the hallway.

And after an act of intercourse, it is possible that he went, it is logical that he went to the bathroom, which that would be the only reason that he would have to put on pants as compared to not having started to get dressed by putting on underpants and then his pants.

As far as the defendant having gone through this individual's property, the wallet itself is spread out on the table as shown in Government's Exhibits 17-A through G, the wallet is spread out on the table and the contents are spread [162] around.

The decedent had approximately an hour before this event $345. At the time that he was taken to the hospital he didn't have anything, not even a cent. No change, no dollar bills.

We submit that it is a logical inference from the array of the property, the fact that he had no money, and, secondly, that the fight that did occur in that room, there was an argument over money in a rolling type situation. That is basically what the Government will be arguing.

MR. GASTON: If I may briefly respond. As to the evidence, that is, taking the photograph, there is obviously no dispute. But that wallet could have been disturbed by the three men who were in the room later. There is no evidence that Miss Agurs did that while Mr. Sewell was in the bathroom.

THE COURT: That is one inference that may be drawn from it. There is no testimony that they disturbed anything other than get the knife from Sewell when they went into the room. But there is no, there are only four people that went into that room, five people. One didn't stay very long. By his own admission, as soon as he saw that Smith and the other man were grappling for the knife, he left and he said he ran down 5th Street to look for the police. He didn't stay very long. So that left four people in the room—the defendant, the decedent, and Smith and the other employee.

[163] MR. GASTON: All right, Your Honor. I have one other point, if I might. Yesterday it came out in testimony that Mrs. Agurs had a heroin habit, and Mr. Clarke indicated to me yesterday that he might be arguing on the basis of that. I would object to that on the basis that the way that that evidence came out was in no fashion proper. It was a medical conclusion without any qualified expert testifying as to it. I think

it would be totally improper for Mr. Clarke to argue on the basis of evidence which came in improperly.

MR. CLARKE: Your Honor, I might be able to alleviate Mr. Gaston's concern here. The Government does not intend to argue the fact that this individual was a heroin addict, that is the reason she is a prostitute and that was the reason she was taking the property in the premises. And the reason we will not argue that, and we do not, first of all, we do consider it to be highly probative of facts in this case, especially through the whole prostitution arrangement and a rolling type situation—

THE COURT: I think so, too. I will permit the Government to reopen, if you wish, and lay it all on the record. The Government made the representation initially that they had no intention of developing that, and it was not done deliberately. It was an inadvertent response to a question.

It was, in a sense, the question could have been sharpened more precisely, but it wasn't, and the witness despite the admonition of the Government's attorney, came out with [164] something that the Government did not intend. Because they did not intend it, it is not expected that Mr. Clarke is going to argue it.

So you will have no problems, Mr. Gaston.

MR. GASTON: All right. May I inquire of Mr. Clarke as to whether he intends to argue that she is a prostitute?

MR. CLARK: Yes, Your Honor, definitely I will.

MR. GASTON: I would also like to enter an objection as to that.

THE COURT: Oh, Mr. Gaston, your objection is noted for the record and it is pro forma.

MR. GASTON: Thank you, Your Honor. I have nothing further.

MR. CLARK: Your Honor, the only thing further the Government has is yesterday counsel for both the Government and the defense and the Court had a discussion as to instructions in this case, and at that time the Government requested an instruction on flight.

And, again, the Government would for the record state that we would request a flight instruction in this case. And we base it on the fact that the defendant, after the decedent had been pulled off her—

THE COURT: I told you I am going to give a flight instruction.

MR. CLARK: Yes, Your Honor. I just want to make the record.

[165] MR. GASTON: I have nothing further, Your Honor.

THE COURT: All right. How much time do you want to argue this case?

MR. CLARK: Your Honor, I believe approximately 15 minutes for opening and 15 minutes for close.

THE COURT: Stick to the evidence and the inferences that can be drawn from the evidence, and keep your personal opinions out of it, and I won't have to interrupt either one of you.

MR. CLARKE: Yes, Your Honor.

THE COURT: But otherwise, I will.

MR. GASTON: Your Honor, I don't believe I will be taking more than 30 minutes.

THE COURT: Thirty minutes?

MR. GASTON: Yes, Your Honor. It is a second degree murder case. It could be shorter than that, but I certainly wouldn't want to go too short.

THE COURT: I'll tell you what you do, you look at those jurors over there as you are talking, because that is what it is all about. If you can keep them interested in what you have to say for 30 minutes, you are welcome to try, and still talk about the evidence in this case.

All right. Have the jury come in.

(The jury enters the courtroom at 11:02 a.m., at which point closing arguments are made to the jury, which are [166] not transcribed as a part of this record.)

INSTRUCTIONS TO JURY

THE COURT: Ladies and gentlemen of the jury, I told you that the Court had the responsibility of instructing you as to the law that applies to the evidence in this particular case.

It's your duty to accept the law as the Court gives it to you. It's your responsibility to consider all of the instructions as a whole, and you should not give any special attention or consideration to any one instruction. You should not disregard any instruction, and you have no right to question the wisdom of any of the rules of law.

It's the function of the jury to determine the facts, and I told you, you are the sole and exclusive judges of the facts in this case. You determine the weight and the value and the effect of the evidence. In that connection you determine the credibility of the witnesses.

Now, make your determination as to the facts in this case without any bias or prejudice or fear or favor toward anybody involved in the case on either side in the case. And consider the evidence in the light of your own observations and experience in the affairs of life.

Nothing that I have said or done during the course of this trial should be taken by you of any indication as to how I feel you should decide any question of fact. And if by [167] anything I have done, that indicates to you my opinion with respect to the evidence, you disregard it, because, I repeat, it's solely your prerogative to determine the facts from the evidence, and it's your prerogative to determine what the verdict in this case shall be.

You heard the evidence. The Court heard it. Counsel heard it. They have argued the evidence to you. If your recollection differs from what they recall the evidence to have been, again, it's your recollection that controls. They said to you quite candidly and accurately that what they said to you is not evidence in the case. They argue it, but what they say by way of argument is not evidence.

The evidence came from that witness stand. It came from the exhibits which have been admitted. And it came from the two stipulations that were entered into. That's the body of evidence from which you find the facts in this case.

Not the indictment. As I told you, you will recall, the indictment is a technical formal manner of accusing a person of a crime in order to bring him or her to trial. And you must not infer that the defendant is guilty because they have been indicted or draw any inference of guilt from the fact of indictment.

The trial Court in any jury case has the responsibility of ruling on questions of law. Those rulings most [168] frequently take place in connection with objections to questions put to witnesses.

If I sustained an objection to a question that was put to a witness during the course of this trial, you disregard the question and do not speculate as to what the answer to that question would have been had it been permitted. And by the same token, if a question and answer were excluded by the sustaining of an objection, you disregard that question and that answer because that doesn't form a part of the body of evidence from which you find the facts.

So we have got the testimony, we have got the stipulations and we have the exhibits. That's the body of evidence.

Now, this body of evidence can be, as has been argued to you, divided into two basic kinds: direct and circumstantial evidence.

Well, direct evidence is the testimony of one who asserts actual knowledge of a fact, or in this case, like the testimony of the witness who said he saw two people do such and such a thing, or the witness Smith who said that he recognized this defendant and this decedent. That is direct evidence.

Circumstantial evidence, on the other hand, is proof of a chain of facts or circumstances. Tending to indicate either the guilt or the innocence of the defendant. [169] The law makes no distinction between the weight that you ladies and gentlemen of the jury are to give

direct evidence on the one hand and circumstantial evidence on the other. The law does not require a greater degree of certainty with respect to circumstantial evidence than it requires with respect to direct.

You have the responsibility of weighing all of the evidence in the case whether it's direct or circumstantial, or a combination of both, and if after a fair evaluation of that evidence, you are not convinced of the guilt of the defendant beyond a reasonable doubt, then you have an obligation to acquit her.

I suggested to you at the outset by way of preliminary instructions that much of the evidence would come through the testimony of witnesses, and you have to judge their credibility. You are the sole judges of their credibility. You determine whether to believe any witness and the extent to which any witness should be believed. If there is conflict in the testimony of witnesses, you have got to resolve the conflict and determine where the truth lies.

With respect to this evaluation of a witness' credibility, you have a right to consider anything that has a bearing on the subject of credibility. By that we mean the witness' demeanor on the stand, the witness' manner of testifying, whether the witness impressed you as having a true and accurate [170] memory and recollection of the events about which the witness testified, whether the witness impressed you as being a truthful individual, whether the witness had any motive for not telling the truth, any animosity or bias toward anybody involved in the case.

With respect to the issue of credibility, you may consider whether the testimony is reasonable or unreasonable, whether a witness' testimony has been contradicted or corroborated by other credible evidence in the case.

If you believe that any witness in your judgment showed himself to be biased or prejudiced for or against anybody in this case, either side in the case, then you have a right to determine whether that bias or prejudice affected either the desire or the capability of the witness to tell the truth.

In short, ladies and gentlemen, you have the responsibility of giving to the testimony of each witness such weight as in your good judgment you think that testimony is fairly entitled to receive.

With respect to Dr. William Brownlee, who testified as the Deputy Medical Examiner for the District of Columbia, he was qualified as an expert in pathology and surgery with respect to performing an autopsy to determine the cause of death. And as such he was permitted to give his opinion.

An expert who is qualified in certain areas of competance is permitted to give opinion evidence in the course [171] of a trial. But you ladies and gentlemen of the jury are not bound by his opinion. You should consider his testimony in conjunction with the other testimony and evidence in the case and give his testimony, again, such weight as you determine it's fairly entitled to receive.

If you think that any witness came in here and was sworn before you and wilfully testified falsely with respect to a material fact about which the witness could not reasonably be mistaken, you may, if you want to, disregard all or any portion of that witness' testimony, or you can take such portion or portions you think is worthy of belief.

The burden of proof is on the Government in a criminal case. I told you at the outset that every defendant charged with a crime is presumed to be innocent, and this presumption of innocence remains with the defendant throughout a trial unless and until he or she is proven guilty beyond a reasonable doubt.

And the burden, the obligation is upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt. This burden never shifts from the Government to the defendant. It never shifts from the Government. The Government always has it.

Under our system of law, as distinct from other systems in other countries in the world, under our system of law a defendant is not required to prove his or her innocence. [172] In fact, the law doesn't require in this

country a defendant to give any evidence with respect to a criminal charge placed against them.

So unless the Government proves beyond a reasonable doubt each and every essential element of the offense or the lesser included offense I will get to in a moment with which this defendant is charged, you must find her not guilty.

Reasonable doubt? Counsel repeated this phrase several times in their argument to you, and you have heard me use it several times already: proof beyond a reasonable doubt.

A reasonable doubt, ladies and gentlemen, is exactly what it sounds like. It's a doubt based on reason, a doubt for which you can give a reason. It's the kind of a doubt that would cause a juror after very careful and candid and impartial consideration of all of the evidence to be so undecided that he or she cannot say that he or she has an abiding conviction of the defendant's guilt.

We may put it another way: it's the kind of a doubt that would cause a reasonable person to pause or to hesitate before acting in connection with the more important affairs in his or her own life. A reasonable doubt may arise from the evidence that has been presented in the course of the trial, or a reasonable doubt may arise from the lack of evidence.

However, a reasonable doubt is not a whimsical [173] doubt, it's not a doubt based on conjecture, it's not a doubt based on speculation. I repeat: it's a doubt based on reason.

In a criminal prosecution the Government is not required to prove the guilt of the defendant beyond all doubt or to prove the guilt of the defendant to a mathematical certainty, or to prove the guilt of the defendant by some scientific certainty. The obligation of the Government in the prosecution of a criminal offense, the burden is to establish the guilt of the defendant beyond a reasonable doubt.

And a defendant is never to be convicted on the possibility of guilt or speculation of guilt or some conjecture that he or she may be guilty.

You have heard it argued to you that the defense contends that you may infer from the evidence in this case that Mrs. Agurs stabbed and cut James Sewell in self-defense. The Government contends that the stabbing and the cutting resulting in his death was not in self-defense.

Therefore, I have got to talk with you and give you the instructions with respect to the law of self-defense, because, ladies and gentlemen, if a homicide is committed in self-defense, it's no crime.

So as you consider the evidence in this case, it would seem logical that the first thing that you consider would be that evidence with respect to this self-defense contention. The Government has the obligation, the burden, of [174] proving that the homicide was not committed in self-defense, and it must prove this beyond a reasonable doubt. If it fails to do so, you must acquit Mrs. Agurs.

Now, if Mrs. Agurs had reasonable grounds to believe and actually believed that she was in imminent danger of death or serious bodily injury from Sewell, and that she had to use deadly force to repell such a danger, she was not required to retreat or to consider whether she could safely retreat. She was entitled to stand her ground and use such force as under the circumstances was reasonably necessary to save her life or to protect herself from what Sewell may have been about to do to her.

However, if Mrs. Agurs could have safely retreated and failed to do so, that's a circumstance that you may consider together with the other evidence in the case in determining whether or not she went farther in repelling any attack upon her, whether the danger by this attack was real or apparent and it was necessary for her to do. If she thought that she was in imminent danger of death or serious bodily injury and that deadly force was necessary to repell that danger, she would be justified in using deadly force in self-defense even though it afterwards turned out that the appearances to her were false. She could have used deadly force even though there was in fact neither a purpose nor a design on the part of

Sewell to kill her or seriously injure her, or any imminent danger that [175] this was going to be done, or the actual necessity that deadly force be used in self-defense.

Even if Sewell was the aggressor and Agurs was justified in using force in self-defense, she wouldn't be entitled to use any greater force than she had reasonable grounds to believe and actually did believe were necessary under the circumstances to save her life or to protect herself from great bodily injury.

Now, in determining whether Mrs. Agurs used excessive force in defending herself, you may consider all of the circumstances under which she acted. Now, the claim of self-defense under the law is not necessarily defeated if greater force than would seem reasonably necessary in cold blood is used by a defendant in the heat of passion generated by an assault upon her, because a belief that may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion.

If Mrs. Agurs was not the aggressor and had reasonable grounds to believe and actually did believe that she was in imminent danger of death or serious bodily injury from Sewell, and she could only save herself by using deadly force against Sewell, she had a right, as I said a moment ago, to use deadly force in order to defend herself. And by "deadly force" we are talking about a force that is likely to cause death or serious bodily injury. [191] But in order for Mrs. Agurs to have been justified in the use of deadly force in self-defense, she must not have provoked the assault upon herself. She must not have been the aggressor.

In this connection, mere words don't ever constitute provocation or aggression. The circumstances under which she acted, including any evidence of intoxication on the part of the decedent, must have been such as to produce in the mind of a reasonably prudent person similarly situated the reasonable belief that Sewell was about to kill her or about to do her serious bodily harm. And in addition, she must have actually believed that she was in imminent danger of death or serious bodily harm and that she had to use deadly force in order to repell this

imminent threat of death or imminent threat of serious bodily injury.

As I have indicated, if you find from the evidence any evidence of self-defense in this case, it's the burden of the Government to prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find, as I indicated, that the Government has failed to prove that the defendant did not act in self-defense, you must find her not guilty. In other words, if you have any reasonable doubt as to whether or not the defendant acted in self-defense, your verdict must be not guilty, because, as I indicated, lawful self-defense is a defense to a homicide. [177] When you have analyzed the evidence with respect to self-defense, and if you find from the evidence that the Government has born its burden with respect to the homicide not having been committed in self-defense, then you will consider whether the Government has proved the essential elements of the offense with which Mrs. Agurs is charged, namely, second degree murder.

Second degree murder is the unlawful killing of one person by another with malice aforethought, but without any premeditation or deliberation. If you have got premeditation and deliberation, we are talking about another crime which is first degree murder. Second degree murder is the unlawful killing of a person with malice aforethought. It may be committed either with or without any purpose or intent to kill if the killing is accompanied by malice, and I will talk about malice in a minute.

The essential elements of the offense of second degree murder, each of which the Government must prove beyond a reasonable doubt, are two:

The first is that the defendant in this case, Mrs. Agurs, in the District of Columbia, inflicted a wound or wounds upon the decedent from which he died. I don't need to elaborate on the evidence with respect to that. You have heard the evidence.

Secondly, the second essential element is that the [178] defendant acted with malice.

Now, in its ordinary use in everyday life the word "malice" would indicate a feeling of hatred or ill will by one person toward another, or a feeling of hostility by one

person toward another. But in its legal sense, malice has a broader significance. Malice does not necessarily imply ill will or hatred or spite or hostility by a defendant toward the person killed.

"Malice" in the law is a state of mind showing a heart that is, regardless of the life and safety of others, a mind that is deliberatedly bent on mischief, a generally depraved, wicked or malicious spirit. Malice as the law knows it is a condition of mind which prompts a person to do a wrongful act wilfully, that is, on purpose, to do injury to another, or to do intentionally a wrongful act toward another without justification or excuse, that is, a wrongful act whose forseeable consequence is death or serious bodily injury.

Malice may be either express or it may be implied. Express malice exists where one unlawfully kills another in pursuance of a wrongful or unlawful purpose without legal excuse.

Implied malice is such as may be inferred from the circumstances of the killing, as, for example, where the killing was caused by the intentional use of fatal force without circumstances serving to mitigate or to justify the act.

[179] In determining whether a wrongful act whose foreseeable consequence is death or serious bodily injury is intentionally done without justification or excuse, and is, therefore, done with malice aforethought, you should, again, bear in mind that it may be inferred that every person intends the natural and probable consequences of his own act or acts. But you are not required so to infer. As I have tried to indicate to you, the intent may be deduced from all of the circumstances that you find in the evidence.

Malice may also be inferred when an act which imparts danger to another is done so wrecklessly or wantonly as to manifest a depravity of mind and a disregard of human life, and such acts results in the death of another human being. But, again, you are not required so to infer.

Would you get Juror No. 7 some water. Better get her another cup, so in case it comes back, she will have some.

Now, the instrument or means by which a homicide has been accomplished is always to be taken into consideration

in determining whether the act is criminal and, if so, in what degree. So if in a prosecution for homicide, it's shown that the accused used a deadly weapon in the commission of the homicide, malice may be inferred from the use of such a weapon. But, again, you are not required to infer malice.

A deadly weapon in the law is any instrument of offense designed to or capable of being used in attacking an [180] adversary and likely to produce either death or serious bodily injury.

Now, if a homicide is committed in the heat of passion caused by adequate provocation, it's not second degree murder. In addition to the adequate provocation, there must be heat of passion caused by that provocation. In other words, both the provocation and the heat of passion must exist at the time of the injury or injuries causing the death are inflicted.

In other words, ladies and gentlemen, a homicide committed in the heat of passion is not second degree murder, and we are talking about second degree murder at this point. Heat of passion which must coincide with the provocation includes rage or resentment or fear or terror. And it may be produced by a combination of these.

Provocation in order to be adequate to acquit this defendant of the second degree murder charge must be such as might naturally induce a reasonable person in the passion of the moment to lose self-control and commit the act on impulse and without reflection. A blow or other personal violence may constitute adequate provocation. But a trivial or a slight provocation entirely disproportionate to the violence of the retaliation is not adequate provocation sufficient to acquit the defendant of second degree murder. And mere words standing alone no matter how insulting, no matter how abusive, no matter how offensive, are not adequate to acquit a defendant of second [181] degree murder on the grounds that he or she was provoked.

The Government has the burden of proving beyond a reasonable doubt that the provocation did not occur in order for there to be a second degree murder conviction, or that any provocation that did occur was not adequate

as a matter of law, or that the defendant, Mrs. Agurs, was not in the heat of passion caused by that provocation. In other words, if you have any reasonable doubt whether or not the defendant acted in the heat of passion caused by adequate provocation, the verdict must be not guilty of murder in the second degree, because, as I repeat, the Government has the burden of proving that the homicide was not committed in the heat of passion caused by adequate provocation in order for there to be a conviction of second degree murder, and this burden must be met, as the Government's burden throughout the case must be met, by the standard of proof beyond a reasonable doubt.

If you determine that the Government has failed to prove the indicted offense of second degree murder, you will then consider whether the Government has proved beyond a reasonable doubt the essential elements of the lesser included offense of manslaughter. There is only one count to the indictment; the indictment charges second degree murder. But a lesser included offense of a second degree charge is manslaughter. It's a lesser degree of homicide.

Now, manslaughter is the unlawful killing of a [182] human being without malice aforethought. Second degree is with malice aforethought. Manslaughter is the unlawful killing of a human being without malice aforethought.

Manslaughter occurs, one, when the homicide is committed at a time of mutual combat. Manslaughter may occur when it's committed in passion or hot blood caused by adequate provocation.

Manslaughter also occurs where a homicide is committed as a result of wrecklessness in conduct by a person involving extreme danger of death or serious bodily injury and a gross deviation from the standard of care or conduct that a reasonable person would observe.

Manslaughter has these five essential elements, each of which the Government must prove beyond a reasonable doubt:

Again, the first essential element is that this defendant, in the District of Columbia, inflicted a wound or wounds upon the decedent James Sewell from which he died.

Secondly, that the defendant stabbed or cut the deceased in sudden passion without malice, or that the defendant stabbed or cut the deceased as a result of wrecklessness in conduct involving extreme danger of death or serious bodily injury and a gross deviation from the standard of care that a reasonable person would observe.

If the jury finds there was sudden passion, then it [183] must also be shown that the sudden passion was caused by adequate provocation.

Lastly, that the homicide was committed without legal justification or excuse.

It's not a defense to manslaughter, as it is to second degree murder, that the homicide was committed in heat of passion caused by provocation. The heat of passion and the provocation must coincide.

And with respect to any homicide that you may find resulting from wrecklessness in conduct involving extreme danger of death or serious bodily injury, I am not talking about a standard based on simple negligence. I am talking about a wrecklessness in conduct which involves an extreme deviation from the normal expectation of human behavior, a gross deviation from normally reasonable standards of conduct that a man or a woman would observe in a particular set of circumstances.

Now, justifiable homicide is the necessary killing of another in pursuance of a legal duty, or, where the person who kills not being himself at fault, had a legal right to kill.

Excusable homicide occurs where the person who kills, although himself or herself at fault, has the legal right so to kill, or where the killing was the accidental result of a lawful act done in a lawful manner.

If you find that the Government has proved beyond [184] a reasonable doubt all of the essential elements of the offense of manslaughter, you may find the defendant guilty of the lesser included offense of manslaughter. If, however, you find from the evidence the Government has failed to prove all of the essential elements of the offense of manslaughter, then you cannot convict the defendant of manslaughter.

There is evidence in this case that after the three employees of Buddies Tourist Home broke into Room 2, the defendant left. Flight by a defendant after a crime has been committed may be motivated by a variety of factors. Flight does not necessarily reflect feelings of guilt, because feelings of guilt may be present in many innocent people and not necessarily reflect actual guilt.

You may, but you are not required to, you may consider any evidence of flight as one circumstance tending to show the defendant's feeling of guilt. You may, but you need not consider feelings of guilt as evidence tending to show actual guilt. But above all, you should not presume guiit from any evidence of flight which you may find in the case. You should consider and weigh the evidence of flight along with the other evidence in the case in determining what weight you are going to give it.

The question of possible punishment in the event of conviction should not enter into your jury deliberations nor affect them in any fashion whatsoever. The duty of imposing [185] sentence in the event of conviction rests exclusively upon the Court. You should weigh the evidence in the case, ladies and gentlemen, in the context of the Court's instructions as to the law and determine this defendant's guilt of innocence solely on a fair evaluation of that evidence and without regard to the question of punishment.

Now, in order to return a verdict, each juror has to agree to the verdict. It's the verdict of each juror. You as jurors have an obligation and a duty to consult with one another in your deliberations and participate in the deliberations, and you should deliberate with a view to reaching a verdict if it can be done without violating your individual conscience with respect to the evidence as you heard it.

Each juror should decide the case for himself or herself, but only after a fair and impartial consideration of all of the evidence and only after participation in deliberation and discussion with your fellow jurors. Don't hesitate to re-examine your view in your exchange in your deliberations. But make your verdict your verdict. You have to be persuaded by the deliberation of other jurors, but you

certainly have a right and you have an obligation to accord them the difference in expressing their views, because each of you has taken a solemn oath with respect to your obligation.

You will retire to the jury room and you will refresh yourselves for lunch, and the marshal will take you to [186] lunch. After you come back from lunch, you will commence your deliberations.

First you select from among your number a foreman or a forewoman, and you may do so in any fashion you choose. The foreman or forewoman presides over the deliberation. That is all the foreman or forewoman does, just somebody has to preside and keep the deliberations going. They have no more weight and no less weight, 12 equal jurors.

When you have arrived at a verdict, there is a deputy marshal right outside the door. He will advise the Court that you have a verdict, and we will take your verdict in open Court.

You are entitled to see all of the exhibits which have been admitted into evidence. If you wish to see all or any one or more of them, you indicate to the Court by a note over the signature of your foreman or forewoman. Give the note to the deputy and he will bring it to the Court and we will have the clerk of the Court see that the appropriate exhibit or exhibits are sent to you.

If for any other reason you have to contact the Court, you may do so, again, by note over the signature of your foreman or forewoman. But do not indicate in any note how you stand with respect to any balloting that may have taken place in the course of your deliberations, because it's nobody's business about your balloting.

[187] Now, we have to excuse the alternate juror at this point. After you have had your lunch, you go back to the jury lounge.

Is there anything further counsel?

MR. CLARKE: May counsel approach the bench, Your Honor?

THE COURT: Surely.

(At the bench:)

MR. CLARKE: I just have one point in the instruction on malice and implied malice, basically. The Court indicated that malice may be inferred from the use of a dangerous weapon. They don't have to infer it, but they could if they want.

I believe in the second grain decision, this is all that has to be done, the added words "without justification or excuse, the use of a dangerous weapon without justification or excuse," I don't think that has to be used in this case because of the circumstances of the case and the other evidence, but I would just like to bring that to the Court's attention.

THE COURT: I think it has been perfectly clear. I think anything more I say to them would just be confusing.

MR. GASTON: I would like to have it left the way it is.

I have something else, if I may, Your Honor. It [188] occurs to me that it might be helpful if the jury were told the order in which they were to consider first self-defense.

THE COURT: I have already told them that. That is they way I gave it to them. I told them the first thing to do when they go in there, didn't I?

MR. CLARKE: Yes, Your Honor.

MR. GASTON: Fine, Your Honor.

THE COURT: I said if it is self-defense, that is the end of it.

MR. GASTON: All right. I have nothing further, Your Honor.

(In open Court:)

THE COURT: Now, one other thing. You have all of the time you need to deliberate on a fair verdict, all of the time that you need. If you have not arrived at a verdict at five minutes to 5:00, we will adjourn your deliberations and start you Monday morning at 9:30.

I make this point clear because I don't want it ever to be said that the jury was pressured into bringing back a verdict, any kind of verdict. You have all of the time you need, all afternoon until five mintes to 5:00, and then

we can adjourn the deliberation and start all over again Monday morning.

All right.

(The jury retires for lunch at 12:41 p.m.)

[189] THE COURT: I think that counsel should stay fairly close. If the only notes that I get from the jury have to do with exhibits, I will merely check the exhibit with the clerk and send it in without calling counsel, unless there is some objection to that.

MR. CLARKE: No objection to that.

THE COURT: Any other note, of course, I will have to talk with counsel, so please stay in close touch with the courtroom clerk,

MR. CLARKE: I will be up in my office this afternoon.

THE COURT: All right. We will stand in recess.

(Luncheon recess taken.)

[190] VERDICT:

(The jury enters the courtroom at 3:03 p.m.)

THE COURT: All right. The clerk will take the verdict.

THE DEPUTY CLERK: Will the foreman please rise.

(Juror No. 4 stands.)

THE DEPUTY CLERK: The defendant rise.

Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE DEPUTY CLERK: What is your verdict as to the defendant Linda V. Agurs on the charge of second degree murder?

THE FOREMAN: We find the defendant guilty as charged.

THE DEPUTY CLERK: Will all the jurors please rise. Is that the verdict of each and everyone of the jurors?

(The jury responds affirmatively.)

THE COURT: Do you wish to have the jury polled?
MR. GASTON: Yes, please, Your Honor.
THE COURT: Have a seat, ladies and gentlemen.
THE DEPUTY CLERK: Members of the jury, as I call your name, please state whether your verdict is the same as announced by your foreman.

(At this point the jury is polled.)

THE DEPUTY CLERK: The jury has been polled, Your Honor.
[191] THE COURT: All right, ladies and gentlemen. You will return to the jury lounge and they will tell you about your next case.

(The jury leaves the courtroom.)

MR. CLARKE: Your Honor, since this is a District of Columbia Code offense and the new provisions of the District of Columbia Bail Act would apply, the Government would ask that the defendant remain committed at this point.
THE COURT: Mr. Gaston, do you want to be heard?
MR. GASTON: Not at this time, Your Honor. I will consider the matter, and when I feel it appropriate, I would file a motion for release.
THE COURT: All right. The defendant will remain committed, and we will get a probation report and set it for sentencing as soon as I receive the probation report.

(Whereupon the trial was concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned official reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

vs.

LINDA AGURS, DEFENDANT

July 24, 1973

Washington, D.C.

Hearing before The Honorable AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O'B. CLARKE, Esq.
Assistant United States Attorney
For the Government

ROBERT I. GASTON, Esq.
For the Defendant

DOYNE W. SPENCER
Official Reporter
4806 U.S. Court House
Washington, D.C. 20001

[2] PROCCEDINGS

THE DEPUTY CLERK: Linda Agurs, Criminal Case 2081-71.

(Defendant not present at 11:52 a.m.)

THE COURT: All right. Mr. Gaston.

MR. GASTON: Your Honor, initially I would like to formally waive the appearance of my client, Mrs. Agurs, in this matter. I do so on the basis that I foresee no prejudice to her in her absence at this hearing. And I think it will further her interests to have the hearing rather than to prolong it, particularly in light of Your Honor's impending vacation.

We are here this morning on a motion that I have filed on behalf of Mrs. Agurs for a new trial. She was convicted of second degree murder.

Subsequently I learned of new evidence showing that the decedent was of a violent character. Specifically, the evidence was a record of convictions for prior violent offenses. This information was obtained from the U. S. Attorney's file on this case.

The evidence is extremely important because it goes right to the issue of who was the aggressor in this particular tourist home room.

Your Honor will recall that the defendant and the decedent went to a room in a tourist home, and shortly thereafter the desk clerk heard screams from the defendant for help. He [3] and two other employees, went to the door of the room and knocked. They were unable to gain entry and the screams continued. They broke the door down and found the decedent and Mrs. Agurs on the bed. The decedent was on top of Mrs. Agurs and they were struggling for a knife which was pointed downward toward Mrs. Agurs at the time. The people broke into the room, pulled the decedent off Mrs. Agurs, and struggled with the decedent for a while before obtaining possession of the knife.

Thus, in light of the defendant's defense of self-defense, the only real issue in the case was who was the aggressor in the room. And that is directly, that is the issue which this new evidence goes directly to.

Under such circumstances, the evidence is admissible under the case of United States vs. Burkes which I referred to in my points and authorities.

Those points and authorities also cited the Brady case which prohibits the prosecution from withholding requested favorable evidence which is material regardless of whether the prosecutor acted in good or bad faith.

I also cite the case of Barbee vs. the Warden of the Maryland Penitentiary, a Fourth Circuit case, which held that it is a denial of due process for the prosecutor to withhold favorable information whether or not the defense requested it, because the defense might not know that it existed.

Then I also refer the Court to the chief judge's [4] concurring opinion in 1965 in the Ellis case where he stated that even where an accused had a lead concerning the newly discovered evidence and didn't follow up, the Government still is not necessarily relieved of its duty to disclose.

Now, in its opposition the Government cites two cases which I would like to discuss briefly.

The first one is the Thompson case, a 1950 case. In that case the newly discovered evidence for which a new trial was sought involved a police record for petty larceny of the Government witness. And in that case the Court set up five standards or five tests which had to be passed in order for a new trial to be awarded on the basis of newly discovered evidence.

Those five elements were: that the evidence discovered, that the evidence be discovered since the trial; that the party seeking the new trial must show dilligence in attempting to procure the newly discovered evidence; that the evidence must not be merely cumulative or impeaching and that the evidence must be material to the issues involved; and that the evidence must be of such a nature that in a new trial it would probably produce an acquittal.

In Thompson the Court found that the second, third and fifth elements—lack of dilligence on the part of the party seeking a new trial, the fact that the evidence was for impeachment, and the fifth one, that the new evidence

would not [5] probably produce an acquittal—were missing, or that they were there, and that was the problem with the case, and the Court denied a new trial on that basis.

Now, Mr. Clarke in this case argues that the defense was not dilligent in attempting to procure this newly discovered evidence, and that there is not a probability of an acquittal if there is a new trial.

On the point of dilligence, I would like to say that, as I stated, the Thompson case is a 1950 case. Since that time, in 1964 the Barbee case was handed down. As pointed out, that held that the Government should turn over reports even though not requested.

Also, our own Court of Appeals, in 1966 in the case of Levin vs. Katzenbach, stated the following: "Ordinarily, a finding of lack of due dilligence will defeat a motion for new trial based only upon the significance of newly discovered evidence." But appellant's "claim for relief based upon a breach of prosecutor's duty of disclosure challenges the fairness and, therefore, the validity of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, dilligent or fortunate counsel might possibly have come upon the evidence on his own."

As to the probability of acquittal if a new trial were granted, I don't know if that is technically the test of whether or not a new trial should be granted. The Supreme Court [6] ruled in a situation like this that the Court should ask whether it would not be too dogmatic on the basis of mere speculation for any Court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before the jury. That is the Supreme Court case of Griffin v. United States, 336 U.S., on pages 708 and 709.

That case came back to our own Court of Appeals in an opinion, 183 Fed 2nd 990, and our own Court of Appeals used that test in deciding whether or not a new trial should be granted.

In this case where the evidence was so close as to who was the aggressor, I think it would be difficult to say

that a jury would not attach significance to the evidence of the decedent's violent character.

The Government also refers the Court to the case of Moore vs. the State of Illinois, stating that Moore rejects the argument to the effect that the defense need not request evidence favorable to the accused, which was the holding, as I stated earlier, in the Barbee case. It is true that Moore does quote from Brady. It quotes the Katzenbach holding which admittedly stated "upon request." But that is all the Court did in that case. It merely quoted the holding in Brady. The Court in Moore refused a new trial, not because the evidence wasn't requested, but because the evidence was immaterial. And that was the basis for the holding in that case.

[7] As a matter of fact, the Court in Moore pointed out that the Government turned over its entire file to the defense prior to trial. So contrary to what Mr. Clarke indicates in his opposition, nowhere that I could find, nowhere in that opinion does the Court specifically reject the argument that the defense need not request the evidence.

In summary, the cases point out again and again that a prosecutor's obligation is larger than merely obtaining a conviction. It is to insure that a trial is fair and that required due process procedures are met so that the innocent are acquitted just as readily as the guilty are convicted.

I have nothing further, Your Honor.

MR. CLARKE: With the Court's permission, Your Honor, as the Government has indicated in its opposition to defendant's motion for a new trial, the decedent in this case did have a record, a record in 1963 for an arrest for assault, I believe it was assault on a police officer, and possession of a dangerous weapon, which resulted in a conviction of simple assault and carrying a dangerous weapon.

In 1971 the decedent also, as we indicated on page 3 of our motion, again ran afoul of the law, in a sense, and was arrested for assault. But at this time he pleaded guilty on April 28, 1971, to carrying a dangerous weapon.

Now, those are the only two indications of prior violence by way of past offenses that the decedent had in his [8] record or against him.

As we also indicated in our motion, during the preparation of the trial by both the defense and the Government, counsel for the defense and counsel for the Government had numerous discussions, at which time both counsel went over their theories of the case. During those discussions it was evident to both parties that neither side considered Mr. Sewell to be a paragon of virtue. This was evident from the fact that he would carry the knife that he had on him at the time of the incident, the knife that was actually used to kill him, the long sheathed knife.

The evidence in the case shows that Mr. Sewell went with Linda Agurs to a motel room during the daytime for obvious acts of prostitution, again, going to show what type of character this individual had.

Now, although the decedent may have had a history of violent acts, the first act was in 1963, approximately eight years before his death, and the second act was about a year or so before his death.

Although he might have had that record, in a sense, the crucial evidence in this case which defeats the materiality of the defense aspects or the defense request for items, the record, is that the decedent was not able to inflict a single mark on the defendant. The defendant would have been the only one to have the knife, if this defendant did have a violent [9] character, it could be assumed that he would have been able to at least inflict a cut or a stab wound upon the defendant before he received the numerous wounds that he did in this case.

Going to the merits of the defense contention besides the materiality of the evidence itself, as I have indicated, defense counsel was well aware of Mr. Sewell's background throughout the discussions that we had together. This was indicated in the Thompson case, a case which the Government relies upon not only to set out standards for judging a new trial motion, but also as a case applicable to the situation in this case.

The defendant could easily have subpoenaed the record of the decedent, especially when they were on notice that

this individual might not have been a completely innocent person, a man without any background at all. They didn't. They didn't take the slightest action to go over and ask for items from the records center, come to Court for a subpoena if that was denied, or even request of the Government any evidence as to the man's prior background.

Now, there is no indication that the Government, if given such a request, would have in any way denied it, would have refused to agree with the defense request, if they wanted to have it.

Now, going to—

THE COURT: Let me interrupt you. This decedent's [10] wife testified in this case.

MR. CLARKE: Yes, she did, Your Honor, Mrs. Sewell testified as to the circumstances, several hours prior to the death.

THE COURT: Was there any reputation evidence at all presented with respect—

MR. CLARKE: None at all, Your Honor.

THE COURT: With respect to the decedent?

MR. CLARKE: None came in.

THE COURT: Was any proffered?

MR. CLARKE: No, Your Honor, there was no proffer one way or the other.

THE COURT: All right.

MR. CLARKE: Your Honor, the Government does rely upon Moore to state the fact that in order to have a Brady violation, there must be a request for the items. There cannot be something that later on appears.

THE COURT: What are you saying? How can you request that which you don't know exists. That is the very essence of Brady.

MR. CLARKE: Yes, Your Honor. But the Supreme Court said in Moore, they faced that in argument and they rejected that argument by specifically holding, the heart of the holding in Brady, the prosecution suppression of evidence in the face of a defense production request. In other words, Your Honor, the [11] Government must be put on notice that the item which the defense requests is favorable to the defense in the sense that the defense would want it.

A. Departure From Normal Rule 33 Standards for Awarding a New Trial on the Basis of Newly Discovered Evidence Is Justified Only When the Prosecutor has Breached a Duty of Disclosure

The relatively stringent standards ordinarily applied in passing upon Rule 33 motions are the product of important policies designed to promote the finality of judgments and conserve the limited resources of the criminal justice system. These standards reflect the balance that has been struck between, on the one hand, the vital need for the criminal justice system adequately to protect against the conviction of innocent persons and, on the other, the desire to avoid unduly depreciating the value of judgments rendered after fundamentally fair trials. The consensus among the courts of appeals on the principles governing such motions evidences a broadly based understanding as to the proper accommodation of these conflicting interests. Therefore, some factor other than the mere exculpatory potential of the newly discovered evidence must enter the analysis before a departure from these rules would be justified. We submit that the only proper occasion for relaxing these standards is when it is found that the prosecution breached a duty to disclose evidence in its possession to the defense.[9]

[9] There is authority, following the leading case of *Larrison* v. *United States*, 24 F.2d 82, 87-88 (C.A. 7), for lowering the normal Rule 33 standard in the case of perjured testimony by a prosecution witness, even though the perjury was unknown to the prosecution and it is deemed blameless for the occurrence. See, *e.g.*, *Gordon* v. *United States*, 178 F.2d 896, 900 (C.A. 6), certiorari denied, 339 U.S. 935; *United States* v. *McBride*, 463 F.2d 44 (C.A. 5), certiorari denied, 409 U.S. 1027. For the reasons discussed in the text, we believe this line of authority is unsound; the discovery of perjury by a prosecution witness logically should be treated no differently from other newly discovered evidence. The Second Circuit recently adopted this view and has declined to continue following *Larrison*. *United States* v. *Stofsky*, No. 74-1860, decided November 7, 1975.

When the prosecutor suppresses evidence in violation of his duty of disclosure, his misconduct may seriously impair the fairness of the trial. In such instances, substantial systemic interests in deterring future prosecutorial misbehavior and in preserving the integrity of the judicial process combine with the defendant's interest in a fair trial to justify the awarding of a new trial upon a reduced showing of the likely impact of the newly discovered evidence. But where there is no evidence of prosecutorial culpability in the conduct of the trial, prophylactic considerations vanish, as do considerations of fairness, and society's strong interests in prosecuting persons legitimately accused of crime and in preserving the finality of criminal judgments require that the normal Rule 33 criteria be satisfied. See *Ross* v. *State of Texas*, 474 F. 2d 1150 (C.A. 5), certiorari denied, 414 U.S. 850.

It is universally recognized that, if the prosecution and the defense both remain in ignorance until after the trial of the existence of a piece of potentially exculpatory evidence that probably would not

have produced an acquittal, a Rule 33 motion for a new trial properly should be denied (see note 7, *supra*). The mere discovery of that same piece of evidence in the prosecutor's files does not, of itself, rationally justify departure from the prevalent Rule 33 standards. Absent breach of a prosecutorial duty of disclosure, the government's possession of information not known to the defense does not denigrate the fairness of the trial. A duty of disclosure may arise under the Constitution, by rule, or by statute, but a finding of the breach of such a duty is a logical prerequisite to relaxation of the Rule 33 requirements.[10]

[10] We recognize that this analysis differs from the conceptual structure adopted by the court below and by the Second Circuit, both of which appear automatically to lower the normal Rule 33 standard whenever the evidence is found in the prosecutor's files, without any separate analysis of whether the prosecutor has breached any duty of disclosure. In the District of Columbia Circuit, as evidenced by the instant case and by *Levin* v. *Katzenbach*, 363 F.2d 287, the prosecutor's possession of the evidence is sufficient to support application of the lowest standard for assessing the sufficiency of the evidence to justify a new trial (the "might have affected" standard). In the Second Circuit, the decisions divide nondisclosures into two categories: in instances of "deliberate" or "intentional" suppression, a new trial is granted "if the evidence is merely material or favorable to the defense" (*United States* v. *Kahn*, 472 F.2d 272, 287); where the nondisclosure is characterized as "inadvertent," a conviction will be set aside only when there is "a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction" (*United States* v. *Miller*, 411 F.2d 825, 832). For the reasons discussed in the text, this linkage of the award of a new trial to the fortuitous

It follows, contrary to the conclusion of the court below, that the post-trial discovery of previously undisclosed evidence in the hands of the prosecution does not justify a precipitous reduction of the Rule 33 standard for assessing the sufficiency of the evidence to support a new trial. Rather, its discovery should prompt an analysis of the prosecution's duty with respect to that particular information. Only after consideration of the origin and nature of the prosecution's obligation and its efforts at compliance is the question of the proper standard for assessing materiality logically presented. See *Levin* v. *Clark*, *supra*, 408 F. 2d at 1217 (Burger, J., dissenting). Moreover, the prosecutor's conduct must be judged on the basis of the circumstances that existed at the time of his acts or omissions, not retrospectively on the basis of unforeseen developments (such as the *Burks* decision).

The court of appeals, however, pretermitted discussion of the prosecution's duty to disclose Sewell's criminal record and of the efforts, if any, required to discharge that responsibility. In so doing, the court ignored the considerations of fairness and deterrence of prosecutorial misconduct that alone can justify departure from the normal standards for assessing newly discovered evidence. It is to the

circumstance that evidence was in the prosecutor's file, rather than to any notion of culpable prosecutorial misconduct, divorces the court's selection of a more generous standard from the policy considerations that justify such action.

correct delineation of the prosecutor's duty of disclosure that we now turn.[11]

B. The Prosecution's Duty to Disclose Evidence to the Defense Normally Is Conditioned Upon a Focused Defense Request

In *Brady* v. *Maryland*, 373 U.S. 83, this Court held that the suppression by the prosecution of evidence favorable to the defendant, despite his request for its production, constitutes a denial of due process of law if the evidence withheld is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.[12] The Court reasoned

[11] Since *Brady* v. *Maryland* and *Moore* v. *Illinois* were state cases, this Court's discussion of the prosecution's duty of disclosure in those cases was necessarily premised on the Due Process Clause. In the argument that follows, we assume that federal courts may impose more stringent, non-constitutionally-mandated standards of disclosure upon federal prosecutors under their supervisory power over the administration of federal criminal justice. But the analytic framework of our argument is not affected by that power. Determination of whether prosecutorial misconduct justifies relaxation of the Rule 33 materiality standard still depends upon a prior consideration of the general scope of the prosecution's duty and the adequacy of its compliance efforts in the particular case.

[12] The "good faith or bad faith" language means, we think, simply that an objective test is to be applied in assessing the prosecutor's acts or omissions, rather than undertaking a subjective inquiry into his state of mind. The language thus does not mean that courts are free to avoid inquiry into whether the prosecutor has breached a duty of disclosure. That the central concern in *Brady* was the unfairness to the defendant resulting from prosecutorial misconduct is evidenced by the Court's derivation of this rule from the principles developed in *Napue* v. *Illinois*, 360 U.S. 264, and *Mooney* v. *Holohan*,

that the prosecutor's act of withholding exculpatory evidence *demanded by the accused* cast the prosecutor in the role of architect of an unjust proceeding and constituted misbehavior of constitutional dimension. *Id.* at 88.

In *Moore* v. *Illinois*, 408 U.S. 786, this Court reiterated the *Brady* standards for determining whether the defendant has been afforded a fundamentally fair trial, again including as one necessary condition a prior defense request for the production of evidence. The Court stated that the following criteria determine whether the prosecution violated its duty of disclosure, thereby necessitating a new trial (*id.* at 794-795):[13]

294 U.S. 103, and their lower court extensions, that the prosecution unconstitutionally deprives the accused of a fair trial by knowingly permitting false testimony to remain uncorrected before the trier of fact, or by contriving a conviction through the knowing use of perjured testimony and the concomitant suppression of favorable evidence. See also *Pyle* v. *Kansas*, 317 U.S. 213; *Alcorta* v. *Texas*, 355 U.S. 28; *Miller* v. *Pate*, 386 U.S. 1.

[13] The decision in *Moore* effectively undermined the precedential value of those authorities that had tentatively interpreted the *Brady* inquiry as turning only on the ultimate possibility of harm to the defendant resulting from the fact of nondisclosure, rather than upon the element of prosecutorial misconduct in failing to respond to an appropriately drafted production request. The leading judicial authority that had espoused this approach was *Levin* v. *Katzenbach*, 363 F.2d 287 (C.A. D.C.), remanded, 262 F. Supp. 951 (D. D.C.), reversed *sub nom. Levin* v. *Clark*, 408 F.2d 1209, 1211-1212 (C.A. D.C.), upon which the court below rested its decision (Pet. App. A, pp. 10a-11a); also compare *Giles* v. *Maryland*, *supra*, 386 U.S. at 99-102 (Fortas, J., concurring

(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

The court of appeals did not find that respondent had made a request for production of decedent's criminal record, nor did it find that the prosecution had intentionally suppressed that evidence. Since there was no defense request, the prosecution's failure to disclose that information did not violate any duty owed to respondent as delineated in *Brady* or *Moore*. We submit that it is not appropriate to expand the prosecutor's duties of disclosure, as did the court of appeals, by jettisoning the request requirement.

The logical implication of the court of appeals' decision is that the prosecution would be required to anticipate, without the guidance provided by a meaningful production request, the possible utility of all evidence in its files arguably somewhat favorable to the defense. Under that analysis, nondisclosure resulting from a failure to appreciate the significance of certain evidence to the defense or to realize that the defendant was unaware of its existence is held to deprive the accused of a fair trial. But the request requirement is an essential element of a *Brady* violation, and its elimination would fundamentally alter the nature of criminal proceedings in both state and federal courts.

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in the judgment), with *id.* at 116-119 (Harlan, J., dissenting).

The prosecution's case files routinely contain many different types of physical and testimonial evidence gathered from multiple sources, much of which will not prove relevant, useful in trial preparation, or admissible into evidence. Since the prosecution cannot entirely foresee the course of the trial and, with limited exceptions not germane to this case,[14] can only speculate about the contours of defenses likely to be raised, the exculpatory character of specific items in its files will not necessarily be apparent to the prosecutor in advance of trial.[15] Moreover, without

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[14] The defendant's privilege against self-incrimination does not prevent him from being required to disclose in advance of trial his intention to rely on certain defenses in which the risks of fabricated testimony are great, such as alibi. *Williams* v. *Florida*, 399 U.S. 78. In federal courts, a defendant is required to notify the prosecution if he intends to rely on a defense based on his mental condition at the time of the crime, Fed. R. Crim. P. 12.2(a), or, upon written demand of the prosecution, if he intends to offer a defense of alibi, *id.* at 12.1(a). If the defendant requests discovery of certain tangible objects, papers and reports, examinations or tests from the government, he is required, upon request, to allow the government to discover from him similar items he intends to introduce at trial. Fed. R. Crim. P. 16(b)(1)(A).

[15] The very nature of criminal proceedings can operate to prevent the prosecutor from being able to disclose useful exculpatory information without a particularized defense request, even though he acts in good faith. The prosecutor's inability to anticipate trial developments may prevent him from determining whether an item of information would prove exculpatory or harmful to the accused until it is considered in light of all the other evidence introduced at trial. See *United States* v. *Keogh*, 391 F.2d 138, 147 (C.A. 2); *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y.); 8 Moore, *Federal Practice* ¶ 16.06[2], p. 95 (1975 rev.); Nakell, *Criminal*

a reasonably specific request, the prosecutor cannot determine what information is known to the defense and what further evidence might be particularly useful to support its contentions at trial.

If the prosecutor's duty of disclosure is activated, as we think it must be, only when the prosecutor is on notice or chargeable with knowledge of the potential exculpatory significance of matter in his files, then the production request plays an essential mediating role in delimiting the extent of that duty. As Judge Friendly observed, the defendant's request "serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files." *United States* v. *Keogh*, 391 F. 2d 138, 147 (C.A. 2). Moreover, the focusing effect of the request diminishes the prosecutor's burden in reviewing his files and thereby allows him to make a more informed and discriminating assessment of the exculpatory nature of evidence in his possession. *United States* v. *Miller*, 411 F. 2d 825, 831-832 (C.A. 2).[16]

Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C. L. Rev. 437, 458 (1972). Moreover, the prosecutor, as an advocate, approaches the evidence with a different perceptual framework from defense counsel. Given the prosecutor's burden to prove guilt beyond a reasonable doubt, his natural instinct to emphasize evidence supporting his own position may prevent him from fully appreciating the value of other evidence to defense counsel, who has no burden of going forward, and who may defend by rebuttal and attacks on the credibility of government witnesses on matters unrelated to their testimony against the accused. See *Woodcock* v. *Amaral*, 511 F.2d 985, 990-991 (C.A. 1); Nakell, *supra*, 50 N.C. L. Rev. at 458.

Since the production request alerts the prosecution to the importance of evidence that might not ordinarily command its attention and warns it that the material may not be accessible to the defense, the request reasonably may be expected to affect the standards governing the prosecutor's subsequent compliance efforts. Accordingly, given a proper request, failure to use due care in identifying, assembling, and disclosing exculpatory evidence in its possession may constitute prosecutorial misconduct and therefore justify relaxation of the materiality standard governing the granting of a new trial under Rule 33.

Other important practical considerations support retention of the request requirement. With the knowledge garnered at trial of the identity of the oppos-

[16] For the defense production request to serve its function of flagging the evidence the accused needs to prepare for trial, it must be somewhat narrowly and meaningfully drafted. A general request for all exculpatory information in the government's possession is the functional equivalent of no request, because it provides no basis by which the prosecutor may discriminate between the potentially helpful and the useless information in his files. *United States* v. *Moore*, 439 F.2d 1107 (C.A. 6); *United States* v. *Conder*, 423 F.2d 904 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958; *United States* v. *Brawer*, 367 F. Supp. 156 (S.D.N.Y.), affirmed, 496 F.2d 703 (C.A. 2); see 1 Wright, *Federal Practice and Procedure, Criminal* § 254, p. 515, n. 76 (1969 ed.). *Contra, United States* v. *Baxter*, 492 F.2d 150 (C.A. 9), certiorari denied, 416 U.S. 940; but see *Lee* v. *United States*, 388 F.2d 737 (C.A. 9) (requests before and at trial).

ing witnesses, the controverted issues and the conflicts in testimony, hindsight may show that the defense could have utilized other information effectively. If a mere demonstration that the prosecution's files contained evidence that might have been useful to the defense were sufficient, even absent a defense request, to require a new trial, the prosecutor's pretrial responsibility for screening evidence would be great [17] and the cost of misjudgment prohibitive. The only prudent course in most cases would be simply to throw open those files to the defense prior to trial, even though that practice (which this Court in *Moore*, *supra*, 408 U.S. at 795, clearly indicated is not constitutionally required) would facilitate the fabrication of testimony and intimidation of potential witnesses and give rise to the other evils that have caused discovery to be limited in criminal proceedings. Under any other policy, the risk that some evidence not so disclosed would later be found to require a new trial, under a lenient definition of materiality, would be unacceptably high.[18]

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[17] This burden would be especially onerous for already overloaded urban prosecutorial offices, whose preparation period is generally short and in which different attorneys may handle a case at various pretrial stages.

[18] Indeed, prior to *Moore*, those commentators who considered the presence of a defense request in *Brady* wholly fortuitous had concluded that the practical inability of the prosecution to identify favorable material with precision before trial would force the government to introduce an open criminal files system to prevent reversal under *Brady*. See *Giles* v. *Maryland*, *supra*, 386 U.S. at 101-102 (Fortas, J., concurring in the judgment); Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136, 149 (1964); Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. Rev. 437, 458-461 (1972); Comment, *Criminal Procedure—Disclosure of Prosecutor's Evidence—Disclosure of Favorable and Material Evidence Required Although Procurable by Diligent Defense Counsel*, 42 N.Y.U. L. Rev. 764, 770-771 (1967).

Moore v. *Illinois*, *supra*, refuted this approach, but these works correctly anticipated the necessary implications of the court of appeals' treatment of the request requirement as dispensable in showing misconduct.

Moreover, the approach of the court of appeals in this case unwisely ignores society's legitimate interests in the finality of convictions rendered after fundamentally fair trials by making the validity of criminal judgments dependent upon a post-trial odyssey through the prosecution's files. A general dispensation of the request requirement, especially if coupled with a liberal definition of materiality, would reward the efforts of imaginative defendants who comb the prosecutor's files after the trial, in the hope of uncovering some marginally significant undisclosed information to support a novel theory that arguably "might have" affected the jury's verdict. The defense also would be encouraged itself to withhold possibly exculpatory information at trial and subsequently institute collateral proceedings to attack a conviction on the ground of prosecutorial "suppression" of that same evidence, thus seeking a second opportunity to convince a jury, but with the additional advantage of knowing the prosecution's case in advance. See *Levin* v. *Katzenbach*, *supra*, 363 F. 2d at 296 (Burger, J., dissenting).

The practical necessity of the prior defense request requirement is graphically illustrated by the facts of this case. The nondisclosed evidence clearly was not of sufficient importance to establish an *ipso facto* violation of the prosecution's duty. The record shows (App. 162) that the government's files contained a myriad of factual material, including Sewell's criminal history. The prosecutor and defense counsel stated that they both had considered that history to be inadmissible in proving self-defense. Furthermore, a witness had already informed counsel of the probable existence of the decedent's record. Under these circumstances, the prosecutor's lack of appreciation of the potential utility of this information to the defense cannot be equated to misconduct. A *Brady* request, on the other hand, would have alerted the prosecution to the possible usefulness of that otherwise neutral information, and there is absolutely no reason to suppose that such a request would not have been promptly fulfilled. This case presents a fitting situation for requiring the defense to perform the simple task of tendering a meaningful request for information related to the proposed area of inquiry before the prosecutor's nondisclosure can properly be described as misconduct depriving respondent of a fair trial.

In summary, where the nondisclosed evidence is not of such obvious importance that the prosecution's failure to volunteer it demonstrates active connivance in an unjustified conviction,[19] those courts of

[19] See note 21, *infra*.

appeals that have examined the scope of the prosecution's duty of disclosure, other than the court below, have concluded, following *Brady* and *Moore*, that the presence or absence of a defense production request is a crucial factor in determining whether the prosecution's failure to reveal information tainted the fundamental fairness of the trial.[20] Unless this Court wishes to institute a radical departure from the practice of conducting criminal trial by means of adversarial procedures, the soundness of the majority view should be reconfirmed.[21]

[20] *E.g.*, *Woodcock* v. *Amaral*, 511 F.2d 985 (C.A. 1); *United States* v. *Miller*, 411 F.2d 825 (C.A. 2); *United States* v. *Schembari*, 484 F.2d 931 (C.A. 4); *Ross* v. *State of Texas*, 474 F.2d 1150 (C.A. 5), certiorari denied, 414 U.S. 850; *Clarke* v. *Burke*, 440 F.2d 853 (C.A. 7), certiorari denied, 404 U.S. 1039; *Evans* v. *Janing*, 489 F.2d 470 (C.A. 8); *United States* v. *Baxter*, 492 F.2d 150 (C.A. 9); *United States* v. *Harris*, 462 F.2d 1033 (C.A. 10).

[21] We do not suggest that the absence of a reasonably specific defense request will inevitably foreclose a finding of prosecutorial misconduct sufficient to justify a lowering of the normal Rule 33 standards. There are, we think, two situations in which application of a more generous standard is appropriate. The first is in instances in which it is demonstrated that the prosecution, recognizing certain information to be of central importance to the defense, deliberately suppresses the information or misrepresents to the defense or the court the nature of information in its possession (*e.g.*, *United States* v. *Ott*, 489 F.2d 872 (C.A. 7)). Where such misconduct, involving subjective bad faith action on the part of the prosecution, is established, the goals of deterrence of future prosecutorial misconduct and fairness to the defendant are both furthered by liberality in granting a new trial motion. See *United States* v. *Gerard*, 491 F.2d 1300 (C.A. 9).

The prosecutor may also violate his obligation to ensure that no accused is wrongfully convicted when he fails spon-

III. UNDER ANY STANDARD OF MATERIALITY, RESPONDENT'S CONVICTION SHOULD NOT HAVE BEEN OVERTURNED

We have contended that the sufficiency of the evidence of decedent's criminal record to justify a new trial should have been judged under the "probability of acquittal" standard of Fed. R. Crim. P. 33. But even under the lowest standard, applicable to clear

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taneously to disclose exculpatory information whose high value to the defense could not reasonably have escaped his attention (see, *e.g.*, *United States* v. *Keogh*, *supra*; *Evans* v. *Janing*, 489 F.2d 470 (C.A. 8); *Levin* v. *Clark*, 408 F.2d 1209, 1216 (C.A. D.C.) (Burger, J., dissenting)), although it is by no means clear that misconduct should be found in such cases if the prosecutor reasonably believes that the defense already possesses the information in question. In any event, in at least some cases involving evidence that is both obviously exculpatory and manifestly of high materiality, prosecutorial nondisclosure may reasonably be equated with deliberate suppression (without the necessity of inquiring into subjective good faith or bad faith of the prosecutor).

Since the information regarding the decedent's prior criminal record in this case does not even arguably fall into the foregoing category, we have no occasion here to attempt any more precise delineation of the boundaries of the prosecutor's obligation spontaneously to disclose obviously exculpatory evidence. We note, however, that most cases in which new trials have been awarded despite the absence of a defense request have involved either physical evidence substantially undermining the prosecution's case, *e.g.*, *Barbee* v. *Warden*, 331 F.2d 842 (C.A. 4) (ballistics and fingerprint tests); *United States* v. *Poole*, 379 F.2d 645 (C.A. 7) (medical report on rape victim), eyewitness exoneration of the defendant, *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (C.A. 2), or vital evidence relating to the motives of prosecution witnesses, *e.g.*, *United States* v. *Harris*, 462 F.2d 1033 (C.A. 10); *United States* v. *Gerard*, *supra*.

Brady violations, the nondisclosure of this evidence does not justify affording respondent a new trial.

Neither *Brady* nor *Moore* defined the standard of materiality that the nondisclosed evidence must satisfy to justify a finding of improper prosecutorial conduct, and, consequently, a new trial. That standard was announced in *Giglio* v. *United States*, 405 U.S. 150, in which this Court stated (*id.* at 154; emphasis added, citation omitted):

> A finding of materiality of the evidence is required under *Brady* * * *. A new trial is required if "the false testimony could * * * in any *reasonable likelihood* have affected the judgment of the jury * * *."

The record unambiguously demonstrates that production of the decedent's criminal record could not in any reasonable likelihood have affected the jury's verdict.[22] As discussed by the four judges who dissented from the denial of rehearing *en banc* (Pet. App. D, pp. 20a-21a), the first impediment to the court of appeals' conclusion is that, even had defense counsel been specifically apprised of the decedent's convictions, he would not have attempted to introduce them at trial for, as is undisputed, he had concluded after consultation with another attorney that

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[22] The standard employed by the court below was whether the nondisclosed evidence "might have led the jury to entertain a reasonable doubt about [respondent's] guilt" (Pet. App. A, p. 11a). Whether this test is more lenient than the "reasonable likelihood" standard is a matter of semantics in this case, for under neither standard could this evidence have justified a new trial.

they were inadmissible (Pet. App. A, pp. 4a-5a; App. 160).

Moreover, presentation of the conviction record to the jury would not have meaningfully bolstered respondent's theory of self-defense, which, as noted by the dissenting judges below, was only "conjured by her trial attorney in argument" (Pet. App. D, p. 22a). The trial court charged the jury on self-defense only "[o]ut of an abundance of caution" (App. 179), and it returned a verdict of guilty after twenty-five minutes' deliberation. Whatever slight evidentiary value decedent's two convictions for carrying a knife might have contained was wholly cumulative of information already introduced by the prosecution, showing that he was an unsavory character and was carrying a knife when he registered for the room. Evidence that is merely cumulative cannot justify the awarding of a new trial under Rule 33. See *Mesarosh* v. *United States*, 352 U.S. 1, 9. Nor, we submit, could the probative value of decedent's eight-year-old misdemeanor conviction for assault have been substantial enough to give rise to any reasonable likelihood that a juror's vote would have been changed. See *United States* v. *Miller*, *supra*, 411 F. 2d at 832, n. 14.

Rather, to the extent that it has any evidentiary value, decedent's conviction record depicts an individual familiar with knives and experienced in physical encounters. Introduction of that evidence would have rendered more incredible respondent's claim that Sewell attempted to inflict such bodily

injury that she was justified in using deadly force, for emphasis of his aggressive character could only have heightened the disparity between respondent's claim of self-defense and her emergence from the fatal interlude without the slightest mark.

Decedent's criminal record pales into insignificance when compared with the suppressed evidence held immaterial in *Moore* v. *Illinois*, *supra*. Thus, even if this evidence were considered newly discovered and the most lenient criterion for award of a new trial were applied to this inadvertent nondisclosure, the decision of the court below still must be reversed for failure to make the showing required for a new trial under Rule 33.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE

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OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,

Petitioner,

v.

LINDA AGURS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS & STATUTE INVOLVED	2
STATEMENT OF FACTS	3
PROCEDURES BELOW	8
SUMMARY OF ARGUMENT	9
I. DUE PROCESS	11
A. Duty to Disclose General Argument	11
B. Evaluation of Factors	13
a. Suppression Not Inadvertent	14
b. Materiality	15
c. Request	18
C. Consistency with Moore vs. Illinois	19
D. Burden of Proof	21
II. INEFFECTIVE ASSISTANCE OF COUNSEL	23
CONCLUSION	22, 29
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases:

Alcorta v. Texas, 355 U.S. 28 (1967)	18
Avery v. Alabama, 308 U.S. 444 (1940)	23
Beasley v. United States, 491 F.2d 687 (6th Cir. 1974)	23, 27, 28
Brady v. Maryland, 373 U.S. 83 (1963)	8, 9, 12, 15, 17, 26
Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962)	27
Chapman v. California, 386 U.S. 18 (1967)	22, 28

Page

Coles v. Payton, 389 F.2d 224 (4th Cir. 1967) . . 23, 24, 26, 28
Evans v. Janing, 489 F.2d 470 (8th Cir. 1973) 12
Evans v. United States, 277 F.2d 354 (D.C. Cir. 1960) 27
Gideon v. Wainwright, 372 U.S. 335 (1963) 23
Giglio v. United States, 405 U.S. 150 (1972) . . . 11, 12, 15, 18
Giles v. Maryland, 386 U.S. 66 (1967) 12, 17
Glasser v. United States, 315 U.S. 60 (1942) 23, 28
Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950) 12, 27
Johnson v. United States, 485 F.2d 240 (10th Cir. 1973) 24
King v. Beto, 429 F.2d 221 (5th Cir. 1970) 23
Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967) 18, 22
McMann v. Richardson, 397 U.S. 759 (1970) 23
McQueen v. Swenson, 498 U.S. 786 (1972) 24, 28
Moore v. Illinois, 408 U.S. 786 (1972) 10, 12, 19
Moore v. United States, 432 F.2d 730 (3d Cir. 1970) 23, 24
Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974) 24
People v. Ibarra, 60 Cal.2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963) 27
Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964) 27
Powell v. Alabama, 287 U.S. 45 (1932) 23
Reece v. Georgia, 350 U.S. 85 (1955) 23
Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965) 27
State v. Williams, 500 P.2d 722 (Ct.App.Or. 1972) 18
United States v. Burks, 470 F.2d 432 (D.C. Cir. 1975) 7, 27
United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) 23, 24, 25, 26, 28

Page

United States v. Hibler, 463 F.2d 455 (9th Cir. 1972) 12
United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3399 (Feb. 1976) 23
United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) 12, 13
United States v. Lucas, 513 F.2d 509 (D.C. Cir. 1975) 27
United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964) 12
United States v. Stern, 519 F.2d 521 (9th Cir. 1974) 24
United ex rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1974), cert. denied, 44 U.S.L.W. ____ (Feb. 1976) 23
United States v. Yarnishefsky, 500 F.2d 1327 (2d Cir. 1974) 24

Treatises and Articles:

American Bar Association, Standards Relating to Discovery and Procedure Before Trial Sec. 2.1(c) (1970) 11
American Bar Association, Standards Relating to the Prosecution and Defense Function Secs. 4.1, 5.1 (Commentary) (1971) 11, 24
Bar Association of the District of Columbia, Young Lawyers Section, Criminal Practice Institute, Trial Manual (1975) 26
Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,

Petitioner,

v.

LINDA AGURS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

I. In a murder case involving the defense of self-defense, may the federal prosecutor, consistent with the defendant's due process rights, withhold a record of criminal convictions of the dead person showing his propensity for violence, admissible evidence of a high degree of materiality, when that record is in the prosecutor's file, and he has led the Court and defense counsel to believe that an informal agreement would

bring about the disclosure of such information if it existed?

II. Whether, when an indigent defendant claims self-defense to a charge of second degree murder, the failure of court-appointed trial counsel to seek to discover by specific request the deceased's criminal record, to research the applicable local law of character evidence, and to investigate the character of the deceased, denies a defendant the effective assistance of counsel provided by the Sixth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No personal shall be * * * deprived of life, liberty or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides, in pertinent parts:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

28 U.S.C. § 2106 (1970) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF FACTS

Respondent is satisfied to rely in general on the statement of the facts of this case as set out in the opinion of the Court of Appeals. However, certain parts of the Government's statement of facts require clarification and reply.

Respondent was convicted of the second-degree murder of James Sewell who died of knife wounds inflicted with his own knife. Respondent's sole theory of defense was that she acted in self-defense when Mr. Sewell advanced upon her with a knife in a locked motel room where they were alone. The Government's theory of the case was that respondent assaulted Mr. Sewell when he returned from a visit to the bathroom down the hall and saw her apparently looking for money. (A. 120-21). A central issue of this case as it comes before this Court revolves around the prosecutor's pre-trial withholding from defense counsel of a record of the decedent's criminal convictions for knife related offenses, including a 1963 conviction for assault and carrying a deadly weapon and a 1971 conviction for carrying a deadly weapon. (A. 145).

During a pre-trial interview with a witness, Mr. Robert Gaston, the trial defense counsel, was told that the dead person might have a criminal record. (A. 160). Defense counsel did not formally press the matter after he came to the erroneous conclusion that the criminal convictions would not be admissible in evidence since his client told him she was unaware of them. (A. 160). Defense counsel has admitted doing no actual research himself on the admissibility question. (A. 160). Rather he was satisfied to rely on an off-hand opinion of a lawyer in no way associated with him. (A. 160). The

older lawyer did suggest that Mr. Gaston consult a case (A. 160) which, if shepardized, would have produced the precedent that Mr. Gaston could have used to argue that the criminal convictions were admissible. However, defense counsel submitted an affidavit, part of the record in the Court of Appeals, which states that it was his belief that an informal discovery arrangement had been worked out which would have produced any existing criminal record of the decedent. (A. 191). "[T]he assistant United States Attorney never presented the decedent's prior criminal record to me as I expected he would if such did in fact exist." (A. 191).

Defense counsel also attempted to enter into a formal discovery stipulation but was induced not to insist on that procedure by the trial judge who assured him that it was not necessary. The trial judge told defense counsel that the United States Attorneys were always cooperative on discovery matters.[1] The record discloses the following colloquy:

> MR. GASTON: As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering whether we might place that agreement on the record at this time.
>
> THE COURT: If it is necessary. Have you had all of the discovery you want?
>
> MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs

[1] The trial practice of the district Court requires that defense counsel participate in informal discovery proceedings before filing a formal discovery motion. See Local Rule 2-5(9), United States District Court for the District of Columbia (1973), reproduced *infra* in Appendix A.

> and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.
>
> THE COURT: It has been this Court's experience we have never had a problem in that regard. (A. 10).

Nothing in the record of this case tends to support the conclusion that the prosecuting attorney was under a genuine misunderstanding with regard to the admissibility of the decedent's record of convictions. It is to be noted that the defense counsel's erroneous belief rested upon both a misapprehension of the legal principle and knowledge of the facts given him by respondent that she did know anything about those convictions. In contrast, the prosecutor had not claimed to have believed in good faith that the record of criminal convictions was inadmissible altogether, irrespective of the state of the defendant's knowledge concerning those convictions. And the record does not show that the prosecutor had any information with respect to the state of the defendant's knowledge on that point. The record discloses that the prosecutor did know Mr. Sewell had been separated from his wife so that the prosecutor could well have thought that Mr. Sewell and the defendant met frequently in the manner revealed by the facts of the instant case. (A. 22). In addition, the record does not show that the prosecutor had any knowledge that the defendant would not testify on her own behalf at the trial. Had she done so she would have been able to testify as to her knowledge concerning the decedent's propensity for violence, if indeed the prosecutor believed defendant's knowledge to be an essential precondition of admissibility. The record does not support the contention that he had any information on that point or tried to get it.

The Government's assertion of the prosecutor's reason for withholding Sewell's conviction record is not supported by the record. At page 6 of its brief, the Government asserts "the prosecutor shared defense counsel's belief that, under applicable precendents at the time of trial, the record of decedent's prior convictions was not admissible unless respondent had actual knowledge of these incidents," citing A. 148. The passage on that page, however, supports no such conclusion. Significantly, that citation is not to sworn testimony (the Government never offered the trial prosecutor's testimony) but to oral argument of the prosecutor on the motion for a mistrial. Even accepting it as part of the record, it says only "there was nothing in this case which indicated to the prosecution that the record of the decedent was in any way favorable or usable by the defense in this case." The prosecutor did not say that he misapprehended the law and, with Mr. Gaston, believed admissibility was foreclosed unless Ms. Agurs knew Mr. Sewell. Nor does he ever state that the Government knew that Ms. Agurs was unacquainted with Mr. Sewell and, if so, the source of that knowledge.

The remainder of the passage seems simply to suggest that the prosecutor would have argued inadmissibility if the records were offered, which is different from deciding the admissibility issue by nondisclosure.

Nor does the record show that the prosecutor ever offered any explanation why the conviction record was

so readily found in a prominent place in his file in the post-trial search.[2]

The record of this case is entirely consistent with the conclusion that the prosecutor knew he was in possession of admissible evidence damaging to the theory of his wholly circumstantial case, and strongly in support of the defense theory of self-defense, or at least highly likely to influence the jury's assessment of the degree of guilt. The record is therefore consistent with the conclusion that faced with that situation the prosecutor decided to "stonewall" on the matter.

About three months after Ms. Agur's conviction, Mr. Gaston (A. 161) read the court of appeals' decision in *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972), which characterized the admissibility of evidence of past violent acts of the victim in cases where self-defense is raised as "long-recognized." Mr. Gaston immediately sought out the Assistant United States Attorney who prosecuted the case and finding him not in his office, asked another Assistant United States Attorney if the decedent had a criminal record. (A. 162). The two of them then located the case file and found the two knife-related convictions close to the front of the folder. (A. 162). The importance to the defense of these two convictions comes from the unique factual setting of this death. The altercation

[2] At page 32 of its brief, the Government argues that the prosecutor's file "contained a myriad of factual material," citing A. 162. The passage on that page does not contain a reference to a "myriad" of factual material, but rather Mr. Gaston's recollection that, in addition to the records of the two convictions of Mr. Sewell that had been admitted there were others, including "convictions for assault with a dangerous weapon and assault on a police officer" which the Government later disputed. (A. 162, § 115.)

which resulted in Sewell's death began behind a closed motel room door. (A. 32). There were no witnesses to the events preceding or occurring contemporaneously with the attack. But some time after the two had entered the room, three persons, all motel employees, testified that they heard a woman screaming for help, that they rushed to the door called out, heard another scream, and one of them broke down the door. (A. 32, 52, 88). The witnesses agree that when they entered the room the decedent was sprawled on top of Ms. Agurs attempting to jam the knife into her chest. (A. 32, 55, 88).

One witness did say that the decedent had his hands on the blade of the knife and that Ms. Agurs had hers on the handle when that person burst into the room. (A. 37, 38). However, another witness contradicted that theory, (A. 70) and a third, coming in the same door, said it was not possible for him to see how the parties hands were positioned. (A. 89). The motel employees wrestled Mr. Sewell off of the defendant and were able to disarm him. (A. 42). Mr. Sewell was taken to a hospital shortly thereafter where he later died (A. 62). Respondent voluntarily turned herself in the next day, was indicted and convicted of second-degree murder. (A. 105).

PROCEDURES BELOW

Following defense counsel's discovery of decedent's criminal record, he moved the trial court for a new trial on the dual bases of newly discovered evidence – the two criminal convictions – and the prosecutor's failure to disclose them, as was required under *Brady*. That

motion was denied, (A. 163), and Mr. Gaston subsequently filed a motion in the Court of Appeals to have himself removed from the case so that substitute counsel could raise the ineffective assistance of counsel issue. (A. 163). Substitute counsel was appointed and asked the trial court for a new trial on the grounds the defense counsel's failure to investigate his case and research the law, and his consequent failure to introduce the criminal record into evidence, constitutionally prejudiced Ms. Agurs. The trial court denied that motion, and an appeal was taken on both the *Brady* issue and the ineffective assistance of counsel claim, and the court of appeals reversed the conviction.

The Court's opinion notes, *inter alia*, that the case could not be characterized as one involving the absence of a defense request for the suppressed evidence. However, the opinion stresses the high degree of materiality of the evidence as "a much more significant factor" than either prosecutorial misconduct or defense neglect. The Court of Appeals held that the evidence of the decedent's propensity to carry and use a knife was of such significance on the issue of who was the aggressor to support the conclusion that Ms. Agurs was denied a fair trial.

SUMMARY OF ARGUMENT

The Court of Appeals decision reversing Respondent's conviction should be affirmed. All of ingredients are present in this case of a violation of the duty of the prosecution to disclose exculpatory material to the defense. The suppression was not inadvertent but a knowing one. The prosecutor was alerted to his

obligation to disclose exculpatory material by informal discovery proceedings. The existence and probative value of the evidence were plain, its admissibility clearcut. Nothing in the record provides justification or excuse for the suppression. The most plausible inference is that the prosecutor suppressed the evidence simply because it hurt his case.

An explicit request for the precise evidence suppressed should not be made a prerequisite to the grant of a new trial where the existence of the evidence is known to the prosecutor and its probative value is more than insignificant. Informal discovery procedures were undertaken to call the attention of the prosecutor to his duty to disclose positive evidence tending to acquit.

The decision of the Court of Appeals was based upon a sound test, especially appropriate to the facts of this case, respecting the materiality of the evidence. The Court concluded that the evidence might have led the jury to entertain a reasonable doubt.

The Court's assessment of the probative value of the evidence of the decedent's convictions of violent crimes, including knife-related crimes, was entirely sensible and cogent. The suppressed evidence had a high degree of probative value, in a completely circumstantial evidence case, on the central issue—who was the aggressor.

Substantial differences exist between this case and *Moore v. Illinois*, 408 U.S. 786 (1972). The prosecutor in this case was not blameless, as was true in *Moore*. The evidence unavailable to the defense in *Moore* was characterized as insignificant. The Court of Appeals has found the evidence in this case to possess a high order materiality. This case and *Moore* differ markedly in their evidentiary contents. *Moore* involved strong direct evidence of guilt. Respondent was convicted in this case by purely circumstantial evidence.

The Government has the burden of demonstrating that the Constitutional violation was mere harmless error beyond a reasonable doubt. That means the Court must be convinced beyond a reasonable doubt that the jury would have reached the same result if the suppressed evidence had been available in its deliberations.

I.

THE DECISION OF THE COURT OF APPEALS REVERSING RESPONDENT'S CONVICTION SHOULD BE AFFIRMED ON THE GROUND THAT RESPONDENT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S NON-DISCLOSURE OF EXCULPATORY EVIDENCE.

A. The Duty to Disclose Exculpatory Evidence – General Argument.

Respondent submits that the Constitutional rights to due process and a fair trial presumptively entitle an accused person to all exculpatory information in the possession of the Government. Due process dictates no less a first principle than that the Government is under an affirmative and demanding responsibility to turn over to the defendant evidence which will tend to acquit.[3] The interest of the Government is to insure the

[3] That such an affirmative duty on the prosecutor's part is appropriately imposed is indicated in the American Bar Association's Standards Relating to Discovery and Procedure Before Trial, Approved Draft, Sec. 2.1(c) (1970), and the American Bar Asosciation's Standards Relating to the Prosecution and Defense Function, Final Draft, Sec. 3.11(a) (1971). The former standard was cited favorably by the Supreme Court in *Giglio v. United States*, 405 U.S. 150 (1972).

emergence of truth at trial. "No respectable interest of the State is served by concealment of information which is material, generously conceived, including all possible defenses." *Giles v. Maryland*, 386 U.S. 66, 98 (1966) (Fortas, J., concurring).

Subsequent to the trial of the present case defense counsel learned that during the course of the trial the prosecutor was in possession of evidence showing that the decedent, James T. Sewell, had been convicted several times for violent crimes. The convictions included two crimes involving knives. That police record was found after a perfunctory search of the prosecutor's trial file. The admissibility of the evidence on behalf of the Respondent at her trial is not disputed. In reversing Respondent's conviction, the Court of Appeals emphasized the materiality of the evidence as the decisive consideration. The Court found that the suppressed evidence had a high order of materiality both as to guilt and as to the degree of the crime and could have altered the outcome of the trial. The decision of the Court of Appeals conforms to the holdings of *Brady v. Maryland* 373 U.S. 83 (1963) and *Moore v. Illinois*, 408 U.S. 786 (1972). The analysis of the Court of Appeals is faithful to the formula for decision set forth in *Moore* which catalogues the various factors requiring evaluation. The cases which have dealt with those factors in the most insightful manner support the result and reasoning of the Court of Appeals.[4]

[4] *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1966); *Evans v. Janing*, 489 F.2nd 470 (8th Cir. 1973); *United States v. Hibler*, 463 F.2nd 455 (9th Cir. 1972); *Keogh v. United States*, 391 F.2nd 138 (2nd Cir. 1968); United States ex rel. *Meers v. Wilkens*, 326 F.2nd 135 (2nd Cir. 1964); *Griffin v. United States* 183 F.2nd 990 (D.C. Cir. 1950).

B. An Evaluation of the Respective Factors Favors Respondent on Each Particular.

Respondent acknowledges that the Constitutional principle advanced here is not capable of the simplistic declarative that a defendant is entitled to a new trial upon a showing that evidence was undisclosed which was in the possession of the Government and which could have been helpful to the defense. A complex set of factors must enter into a statement of the duty to disclose. But a definition of a Constitutional right should not be reduced to a test, of any number of "prongs," for mechanical application to a set of facts.

Respondent submits that an evaluation of the respective Moore criteria points in each particular to a result in her favor. No complex balancing must be undertaken. Perhaps the most comprehensive and cogent discussion of the analytical framework for cases of this kind is found in *United States v. Keogh* 391 F.2nd 138 (2nd Cir. 1968). The instant case fits into Judge Friendly's category of "easy cases," that is, those involving a deliberate suppression in the sense of a failure to disclose evidence whose high value could not have escaped the attention of the prosecutor. Therefore, this is a case which presents a minimal problem with respect to the degree of prejudice which must be shown to warrant a new trial. Notwithstanding, the Court of Appeals found that the suppressed evidence had in fact a high probative value. Its denial was severly prejudicial.

a. The Suppression Was Not Inadvertent

The record in this case does not support a conclusion that the suppression of the evidence by the prosecution was inadvertent. The opinion of the Court of Appeals notes the fact that the prosecutor was aware of the existence of the withheld evidence. No contention has ever been made that the suppression was inadvertent. The Petitioner's Brief points to no support for such a contention. Petitioner refers us to the Prosecutor's statement that he was prepared to resist the introduction into evidence of the decendent's criminal convictions. (A. 164). The implications of this position should be carefully noted. it is an admission that the evidence was on the prosecutor's mind and that it was damaging to his case. The prosecutor never has contended 'that he thought that the evidence was not material. Nor is his position that the evidence was inadmissible, only that he would resist its introduction. Even that position must be carefully scrutinized. In order to make any plausible argument against admissibility of a record showing that the decendent had been convicted of violent crimes, the factual premise had to be that the defendant had no knowledge of them. Of course, it is clear that under the prevailing the evidence would be admitted. But the point is that the record of this case nowhere shows that the prosecutor has any knowledge or has ever claimed to have any knowledge of the defendant's state of mind.

Respondent submits that the most plausible inference is that the prosecutor knew full well he had possession of evidence damaging to his case and helpful to the defense and that he decided to withhold that evidence. The further inference is that he did not merely regard it

as not material after the exercise of due diligence because it was not admissible. Moreover, while no explicit request for that specific evidence was made by the defense, discovery was undertaken which should have alerted the prosecutor to his strict obligation to disclose that evidence which was highly probative on the only conceivable defense theory. Condonation of the prosecutor's behavior in this case should not be forthcoming from this Court.

b. Materiality

Even if we were to assume for the sake of argument a justifiable failure on the part of the prosecution to apprehend the value of the evidence to the defense, and assuming the absence of even the functional equivalent of a request, the present case would still call for a finding of a due process violation because the evidence unavailable to the defense and in the prosecution's possession has such a high probative value. That evidence was found by the Court of Appeals to have the potential to alter the result of the first trial.

The Court of Appeals concluded that the suppressed evidence "might have led the jury to entertain a reasonable doubt." (510 F.2nd at 1253). That is an appropriate verbal formulation[5] of the test governing

[5] Semantical differences exist in the materiality adopted to define what level should be present before reversal under *Brady* is mandated. In *United States vs. Giglio* a "reasonable likelihood" standard was employed 405 U.S. at 154. In *Brady v. Maryland* the question was whether the evidence "would tend to exculpate" the defendant. "373 U.S. at 88. The court below inquired whether the evidence "might have led the jury to entertain a reasonable doubt." (510 F.2nd at 1253).

the degree of materiality necessary for a reversal of the conviction in this case. That text excludes the trivial or insignificant, but it accords the jury its proper role, and the role defendant has a Constitutional right to have the jury exercise, that of evaluating the probative value of the evidence. Respondent has an especially strong claim to have a jury assess the weight of the suppressed evidence given the facts surrounding the suppression.

The prosecutor was trying a murder case where the only imaginable defense was self-defense. The issues were not complex and the evidence hardly voluminous. Doubtless by an instinctive perception of the materiality of such evidence, the prosecutor investigated and uncovered a record of criminal convictions of the dead person. The offenses included a brazen attack upon a police officer. The accused person was a woman, small in stature. The decedent was carrying a frightening weapon at the time of his death, and the defendant was unarmed. The evidence in the case was entirely circumstantial. The prosecutor had to persuade the jury beyond a reasonable doubt that the circumstantial evidence would convince them that the defendant did not act in self-defense. No evidence introduced at trial indicated the defendant was violence prone. The criminal record, then, was powerful evidence against the prosecution. Respondent had only one defense, that her actions were justified because Mr. Sewell was the aggressor in their altercation. The jury was apprised of the fact that the decedent carried a knife. However, the belief may have been formed that he was only defense-minded since he did frequent taverns where trouble could erupt. The Respondent was an easy target for the prosecutor's assertions that she was a would-be thief in the incident which led up to the death. There

was an easily-spun theory that the decedent interrupted the defendant's rifling of his wallet. If the jury had known of decedent's criminal record, they could have been much more easily persuaded to doubt that trite scenario. The jury would have been much less likely to cast the Respondent as the aggressor and they could as easily have been persuaded that it was the decedent who had initiated a situation which caused the Respondent to take up the decedent's own knife in self-defense. The fact that the decedent was a person who would readily use a knife and not merely carry one would have made defense counsel's case much more persuasive and would have made all the difference in the world to the jury. As the Court of Appeals noted, absent his criminal record, the evidence was unclear on whether Mr. Sewell was the type of person who would assault another with a knife. For example, the desk clerk testified that Mrs. Sewell told him that her husband "would use a knife." She later denied making the statement. (510 F.2nd at 1254).

Here the jury not only might have found respondent innocent given the value of the new evidence, but it might also have convicted of the lesser included offense of manslaughter. The possibility of a reduction in penalty is also valid grounds for a reversal under *Brady*, 373 U.S. at 88, and *Giles*, 386 U.S. at 82.

Ample precedent, painstakingly analyzed by the Court of Appeals, exists to support the decision below on its finding of materiality.

The prosecutor's conduct here is strikingly similar to the behavior condemned in *Brady v. Maryland, supra*, where a co-defendant, was withheld. The conduct here also parallels the activity condemned in *Giles v. Maryland, supra*, a rape case in which the prosecution withheld evidence of the victim's sexual proclivities and

the issue was whether she consented to intercourse. A third case on point here is *Giglio v. United States, supra*, where the evidence not disclosed was a reduction of sentence that the Government offered its chief witness in return for his testimony.[6]

c. The Purpose and Function of a Request Were Met in This Case

Plainly a request cannot be made an invariable prerequisite for the conclusion that due process has been denied a defendant by the suppression of exculpatory evidence. Indeed, the cases show that to be a mere truism. Flagrant suppression cannot be justified or excused by the absence of a formal and explicit defense request. The function of a request in these cases is to enlarge the disclosure duty to cover cases where there is no showing of actual knowledge of the existence or possession of the exculpatory evidence by the prosecution, and also to cover cases where the utility of the evidence to the defense may not reasonably be appreciated by the Government through the exercise of due diligence. Where the prosecutor knows he has material evidence and the utility of that evidence is palpable, the reason for the request requirement is nonexistent. The Government should not be permitted to exploit neglect or ignorance of defense counsel.

The inherent and palpable materiality of the evidence in this case, performed the "flagging" function of an explicit request. The informal discovery procedures

[6] *Alcorta v. Texas*, 355 U.S. 28 (1957); *Levin v. Clark*, 408 F.2nd 1209 (D.C. Cir 1967); *State v. Williams*, 500 P.2nd 722 (Ct. App. Or. 1972).

satisfied the functional purpose of the request element of the *Moore* formula. Hence, an evaluation of the request criteria also favors Respondent unless it is to be treated as a purely formalistic requirement applied in a mechanical manner.

C. The Decision of the Court of Appeals is Consistent With Moore v. Illinois.

Moore v. Illinois expressly reaffirmed the obligation of the Government to disclose exculpatory material. The result in that case does not preclude an affirmance of the decision below. Moore turned on a special combination of factors much different from this case. The Supreme Court of Illinois had found no "suppression of material evidence." A majority of this Court agreed that the prosecution had been blameless as to the nondisclosure and found the undisclosed evidence to be insignificant. Pronounced factual differences exist in this case as to every analytical facet.

The significance of the evidence in Moore was a very close question as the sharp division of the Court attests. A witness, Sanders, testified that the defendant had stated to him after the killing that he had shot a bartender in Lansing, where the murder had taken place. Evidence in the hands of the State tended to show that Sanders had mistaken the defendant and one "Slick" Watts. The majority concluded that the undisclosed evidence was not significant on the issue of guilt, relying heavily on the fact that there was direct eyewitness evidence of guilt. A waitress identified Moore as the person who had been ejected from the bar earlier and who had returned and shot the bartender. A

patron testified that Moore was the person who entered and shot the bartender and that the witness had chased him until Moore turned and threatened to shoot him. The other evidence unavailable to the defense was a sketch of seating arrangements made by a police officer which the defense claimed confounded the testimony of the patron. The Court concluded that the diagram simply did not contradict the patron's testimony.

The Moore opinion stresses the direct evidence of guilt and the absence of an intentional suppression. The Dissenting Justices thought that the State's failure to disclose the evidence was the result of something other than inadvertence. They regarded the explanation for nondisclosure proferred by the State as disingenuous. The minority also believed that the undisclosed evidence might well have been of assistance to the defense. The low quality of the evidence and the prosecutor's forthrightness were, therefore, both vital in the result of that case. This case is much different.

The case presented against the Respondent was entirely circumstantial, and her sole defense was self-defense. Whatever tended to show the decedent's propensity for violence and for using knives cannot be dismissed as insignificant. A criminal record showing several convictions for violent crimes and including crimes involving knives would have strong probative value, as the Court of Appeals found. In only a very tenuous sense can that evidence be viewed as cumulative on the ground that the jury has some evidence to indicate that the decedent might have been the aggressor. The evidence of the decedent's violent crimes would not have opened up a whole new line of defense, it is true, but it was highly probative evidence on the question of who was the aggressor. The defense

was badly hurt by its absence. The defendant was entitled to have the jury assess the weight of that evidence. There was utterly no good reason for the defense not to have it. The prosecutor knowingly withheld evidence which was unmistakably damaging to his case and helpful to the defense.

The facts of Moore show an explicit claim of good faith by the prosecutor, the defense attorney himself had scoured the prosecutor's file and the response to discovery was adequate. In the instant case, no claim of good faith has been made and no basis for one exists. The record supports an inference of knowing suppression. The evidence was readily found in the prosecutor's file and its utility was palpable.

D. The Government's Strict Burden of Proof

A vital matter in the decision of this case is the Government's burden of showing beyond a reasonable doubt that the Constitutional violation was mere harmless error. The right to a fair trial may not mean a trial wherein, as a universal proposition, the defendant has the benefit of all evidence which might have been helpful. However, the undisputed fact of possession of exculpatory evidence by the prosecution makes a critical difference because due process is concerned with how the Government obtains a conviction. That is why the relative blameworthiness of the prosecution on the suppression issue is of such importance. And that is what distinguishes this case from mere newly-discovered-evidence cases.

This Court has admonished that "before a federal constitutional error can be held harmless, the court

must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Petitioner has not carried that burden in this case. It cannot be said, reasonably and non-dogmatically, that the jury would not reach a different result as to guilt or the degree of the crime if the jury had the record of criminal convictions of the decedent before it in its deliberations.

CONCLUSION

Respondent urges this Court not to disturb the decision of the Court of Appeals. That Court correctly identified the strong materiality of the undisclosed evidence as a compelling factor and its disposition of the case is supported by the facts relating to the blameworthiness of the prosecution as to the nondisclosure. The informal discovery procedures gave a clear signal to the prosecutor to conscientiously perform his duty to disclose "positive exculpatory evidence which would constitute a defense." *Levin v. Clark*, 408 F.2nd 1209, at 1216, n.2 (D.C. Cir. 1967) (Burger, J., Dissenting).

II.

RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HER TRIAL COUNSEL FAILED TO CONDUCT ADEQUATE FACTUAL AND LEGAL RESEARCH TO SUPPORT RESPONDENT'S CLAIM OF SELF-DEFENSE.

The Sixth Amendment of the Constitution guarantees every criminal defendant the right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 342-3 (1963). The right to assistance of counsel has been interpreted to mean the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970); *see Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Although this Court has recognized a criminal defendant's right to the effective assistance of counsel, it has left the development of correlative standards and duties to the lower courts. *McMann, supra* at 771. Consequently, there is a conflict among the circuits with respect to the appropriate standard.

The majority rule, expressed in several different ways, provides that a criminal defendant has the right to counsel rendering reasonably competent assistance. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *King v. Beto*, 429 F.2d 221, 225 (5th Cir. 1970); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974); *United States ex. rel. William v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1974); *cert. denied*, 44 U.S.L.W. (Feb., 1976); *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975); (Stevens, J.), *cert. denied*, 44 U.S.L.W. 3399 (Feb., 1976).

The minority rule states that a criminal defendant is denied the effective assistance of counsel when the defendant's representation is so inadequate that the trial is a farce, sham, or mockery of justice, *Moran v. Hogan*, 494 F.2d 1220, 1222 (1st Cir. 1974); *United States v. Yarnishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *McQueen v. Swenson*, 498 F.2d 207, 214 (8th Cir. 1974); *United States v. Stern*, 519 F.2d 521, 524 (9th Cir. 1974); *Johnson v. United States*, 485 F.2d 240, 241 (10th Cir. 1973).

Some courts have refined these standards by adopting specific guidelines or duties to which trial counsel must conform in order to render effective assistance. One of these duties, relevant to this case, is trial counsel's responsibility to conduct appropriate factual and legal investigations. This duty has been recognized under the reasonable competence standard, *United States v. DeCoster*, 487 F.2d 1197,1203 (D.C. Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970); and under the more stringent mockery of justice standard. *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

Section 4.1 of the ABA Standards Relating to the Prosecution and Defense Function (App. Draft 1971) states the nature of this duty:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.

The Commentary to this section makes clear the importance of this duty: "Facts are the basis of effective representation."

With respect to trial counsel's responsibility to adequately research applicable law, the Commentary to Section 5.1 of the Standards states:

> The lawyer's duty to inform himself on the law is equally and often more important . . (than the facts)[7]

These Standards were adopted as general guidelines by the District of Columbia Circuit in *DeCoster, supra* at 1203.

Having established that trial counsel has the duty to make appropriate factual and legal investigations, we turn to the application of this duty to the facts of this case.

Respondent was denied the effective assistance of counsel because her trial counsel failed to do the following: (1) move to discover the criminal record of the deceased, James T. Sewell, under F.R.Crim.P.16 (A.10); (2) investigate the background of Sewell after having been informed of his possible violent character (A.159); and (3) research the evidence law of the District of Columbia Circuit with respect to the admissibility of a deceased's character to support a defendant's claim of self-defense (A.160).

The primary issue at respondent's trial was whether she or Sewell was the aggressor in the struggle that resulted in Sewell's death. Self-defense was the defense from the start and, therefore, the character of the deceased was obviously relevant from the beginning of

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[7] "To give adequate representation, an advocate must be intimately familiar with these recent developments (law and procedure) most of them deriving from case law." Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential To Our System of Justice?, 42 Fordham L. Rev. 227, 233 (1973).

the case. The record shows that Sewell was convicted in 1963 for assault with a dangerous weapon (knife) and in 1971 for carrying a dangerous weapon (knife) (A.151).

Although trial counsel's informal discovery agreement with the prosecution did not specifically include the criminal record of the deceased (A.10), counsel expected such material to be released. (A.191)[8] Respondent has previously argued that trial counsel's informal discovery request satisfied the *Brady* requirements. If the Court is to hold that this request did not comply with *Brady*, then it should follow that the failure of trial counsel to have made a more specific or formal request must amount to ineffective assistance of counsel. *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967). At the very least, competent counsel is obliged to take whatever procedural steps are necessary to avoid inadvertent waiver of his client's rights. *See generally* Bar Association of the District of Columbia, Young Lawyers Section, Criminal Practice Institute, Trial Manual 2.6, 4.6, 4.21 (1975).

Further, other than making an informal discovery request, trial counsel did not conduct an independent investigation into Sewell's background. While interviewing a witness two months prior to trial, trial counsel was told that Sewell might have convictions for knife assaults (A.159).

Trial counsel's failure to make these appropriate factual investigations may be explained, but not excused, by his inadequate legal research. Gaston

[8] This informal procedure complied with the District of Columbia District Court Rule 2-5(a) which prohibits formal discovery motions unless informal requests are unsuccessful.

conferred with a semi-retired, local, criminal lawyer who told him a deceased's criminal convictions were inadmissible when the defendant was not aware of them at the time of the crime (A.160). Trial counsel subsequently was told by respondent that she was not aware of Sewell's criminal record. (A.160). He did not pursue the matter further until reading a recent decision of the District of Columbia Circuit, *United States v. Burks*, 470 F.2d 432 (1975), which held that such evidence was admissible. (A.161).

However, trial counsel was told by the same criminal lawyer in a conversation discussed earlier to look at the 1950 case of this Circuit, *Griffin v. United States*, 183 F.2d 990 (A.160). If trial counsel had read and shepardized this case, he would have found authority for the admissibility of the deceased's criminal record, *Evans v. United States*, 277 F.2d 354, decided in 1960. This case relied on Griffin to hold that a deceased's violent character is admissible regardless of the defendant's knowledge thereof. *Id.* at 356. *Evans* was relied upon in *Burks, supra* at 437.

Thus, trial counsel's failure to adequately investigate the facts and law relevant to respondent's claim of self-defense constitutes a breach of duty. *United States v. Lucas*, 513 F.2d 509, 511, n.5 (D.C. Cir. 1975); *Beasley v. United States*, 491 F.2d 687, 691 (6th Cir. 1974); *Schaber v. Maxwell*, 348 F.2d 664, 665-6 (6th Cir. 1965); *Poe v. United States*, 233 F.Supp. 173, 175 (D.D.C. 1964) (Wright, J.), *aff'd* 352 F.2d 639 (D.C.Cir. 1965); *People v. Ibarra*, 60 Cal.2d 460, 464, 386 P.2d 487, 34 Cal.Rptr. 863 (1963) (Traynor, J.); *see Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962). Because the violent character of the deceased is highly relevant to the aggressor issue, the essence of

respondent's case, this breach of duty violates both the reasonable competence and mockery of justice standards. *See United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C.Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

The harmless error test is inappropriate when a defendant is denied the fundamental right to the assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 76 (1942). Similarly, this test is inappropriate when a defendant is denied the effective assistance of counsel. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

Whether or not this analysis should be applied to this case, the ineffective assistance of respondent's trial counsel was not harmless error. Sewell's prior convictions for assault with a knife, and carrying a knife, the latter occurring just one year prior to trial, are material to respondent's claim of self-defense. There is more than a reasonable doubt that such evidence might have influenced the verdict of the jury, *Chapman v. California*, 386 U.S. 18, 24 (1967); if not to acquit respondent, then possibly to convict her of the lesser offense of manslaughter.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Rule 2-5 August 1, 1973

U.S. DISTRICT COURT RULES – D.C.

RULE 2-5

DISCOVERY

(a) MOTION BY THE DEFENSE.

It shall be the duty of every defense counsel, whether appointed or retained, to consult with the Assistant United States Attorney assigned to the case prior to the first status call on a criminal case. At that time counsel shall attempt to obtain from the Assistant United States Attorney informal discovery as to matters to which the defense would be entitled under the Federal Rules of Criminal Procedure and the applicable statutes and cases. No discovery motion shall be heard unless it states that defense counsel has sought the requested relief from the Assistant United States Attorney assigned to the case and that the Assistant United States Attorney has not complied with such request.

(b) ALIBI DEMAND BY THE GOVERNMENT.

(1) Upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecutor a written notice of his

intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(3) Upon the failure of either party to comply with the respective requirements of this rule, the court shall, except for good cause shown, exclude the testimony of any witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

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There was nothing in this case which indicated to the prosecution that the record of the decedent was in any way favorable or usable by the defense in this case. In fact, I would say quite frankly to the Court that the Government's position prior to Burkes was that the prior record of a decedent was not admissible in evidence unless the defendant herself knew about that. And it was only after Burkes that I realized the error of my belief in that one matter. But a close reading, in fact—not a close reading—it specifically spelled out in Moore where they discuss the fact that the belief that if the Government, if the defense doesn't know of it, how can they request it. They say that the essence of Brady is the suppression by the Government of evidence favorable to the accused. And in order to have a suppression, there has to be a request for that, because there are hundreds of items in the Government's file that could be of some essence.

But even if the Government is required without a request to hand over evidence favorable to the accused, we submit that the evidence in this case—

THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item [12] which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specific request for that information, you do not have any obligation to defense counsel?

MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.

THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information, you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?

MR. CLARKE: No. Your Honor, there is another obligation, but it does not come under Brady itself. It comes under more or less a higher standard. If the Court would look at Brady as a generic term of items exculpatory towards the accused, as the nature of the exculpability is great—say, for example, fingerprints on a murder weapon where there could be no other explanation but someone else did it, then, the Government in the interest, under the light of the Burkes case that the Government is after justice and not after just [13] convictions, the Government has an obligation to make that known to the defense.

But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice.

In this case there were discussions on many separate occasions as to the nature of the people, and yet there was no request for anything about his background record.

Now, the Government is in the same position as the defense is in. How is the Government to know that this item is material, or, excuse me, is favorable to the defense, unless it is brought to their attention that the defense needs it. So that is why the Brady standards when dealing with items which are favorable to the defense is necessary that there be a request, and the higher standard of Burkes covers anything such as Your Honor suggested as to the fingerprints. But the Thompson case indicates that the items, the record in this case, is not material in the sense that it requires a new trial. And this standard of Thompson should be read along with the Brady standard as to the materiality requirement that the Government hand it over.

In Thompson the single issue or two issues in the case, the first one was whether or not a person could be convicted on the uncorroborated testimony of an eyewitness in a robbery case. And the Court of Appeals said that it could.

[14] The second prong of attack in Thompson was that the Government had, or the complainant in the case, the single eyewitness to the robbery, had a criminal record,

and that record could have been used for impeachment purposes, and that is newly discovered evidence which is material to the defense and should have been allowed or should have been handed over to the defense and used at trial. And the Court of Appeals indicated that it was not material, was not material to the extent that it should have been granted a new trial. It was impeachment evidence; that is basically all. This was more crucial in the Thompson case that it be allowed because in Thompson it was a single eyewitness against a man accused of committing a crime against him. And, therefore, it became the credibility of one man against another man.

But in this case the Government did not rely upon credibility. It relied on objective facts of the circumstances which showed that this defendant was of a character that was even worse than the record would have shown.

So the Thompson case, if there is any case where there should have been granted a new trial due to newly discovered evidence, that would have been the situation. And certainly not this case where the new evidence in the sense the record would not have changed the jury's determination because the crucial fact in the Linda Agurs case was that there was not a mark on the defendant. But yet the decedent had stabs on his [15] back and to his front. Regardless of what kind of a record he had, unless he was not the aggressor, he would not have been stabbed that many times.

Your Honor, in sum, the Government's position is basically this: First of all, we contend that this was not a Brady violation in light of the Moore case. But even if it is assumed that the Government should hand over without a defense request items, the third part of the Moore case applies, namely, the holding in Brady is that the prosecution suppression of evidence, and then going down, important then are, first, a suppression by the prosecution of a request by the defense, and, second, the evidence is of a favorable character for the defense, and this is the main part, and thirdly, the materiality of the evidence. And materiality of the evidence is also a criterion of Thompson.

The two together, we submit, Your Honor, indicate that in this case the record was not material, and, secondly, that its non-production is not a Brady violation.

For that reason, we ask that the defendant's motion for a new trial be denied at this time.

THE COURT: Do you wish to reply in any fashion?

MR. GASTON: Yes, Your Honor, if I may. I will try not to be too long.

First, as to the record, I am not at this point even willing to concede it was only the two convictions. The record [16] which I obtained from the U. S. Attorney's office file shows that this was an ADW offense on 9/28/63, and a final disposition, it says 180 days. The weapon was a razor.

On the same date there was an assault on a police officer, with a final disposition of 180 days.

On the same day there was a CDW, knife, final disposition, 180 days.

And then I also have a record from the Superior Court of the District of Columbia showing there to be an assault offense in 1971, and it says he was placed on one year probation, execution of sentence suspended.

This is not a matter of record, Your Honor. I wonder if I might have it admitted as an exhibit to my motion at this time and made a part of the record.

THE COURT: Yes. You don't have any objection, do you?

MR. CLARKE: Not at all, Your Honor. In fact, the Government, when it filed its opposition, also filed certified copies of convictions in the case.

THE COURT: Yes.

MR. CLARKE: I believe my secretary was to send down, I believe it is a 1963 certified conviction, once it was received. I do not know if that has been submitted to the Court.

The crucial one is the 1971 one which indicates that [17] it was a CDW conviction.

THE COURT: It will be received as part of the record in this hearing.

MR. GASTON: Thank you, Your Honor.

Mr. Clarke points out at one point that Mrs. Agurs

was totally unharmed while the decedent suffered extensive wounds, and, therefore, the evidence as to who was the aggressor was clear and, therefore, the evidence of the deceased's violent character is not of any great weight.

I would only point out in that regard, as I did at the trial, that he could have—he was drunk at the time, as Your Honor may recall, or had sufficient alcohol in his system to be drunk, and he could very well have overcome her just with his own body, and in order to protect herself, she—

THE COURT: Cut him everywhere but on the bottom of his feet.

MR. GASTON: Well, there were stabs to his front.

THE COURT: That's right.

MR. GASTON: And cuts in back.

THE COURT: That's right. She sliced him up, and knew that he was drunk. She knew his condition.

MR. GASTON: Well, if he was coming after her—

THE COURT: It wouldn't make any difference. That doesn't give her a right necessarily to kill him. He wasn't coming after her with his knife.

[18] MR. GASTON: No, he wasn't.

THE COURT: Because he was out of the room and that is what started all of this business. He was out of the room and she was clipping him for the money he put over, that he hid, because he knew under the circumstances he could be rolled.

So in addition to whatever fee he had worked out with her, he could be clipped for all of the money he had, the money he was going to take his wife to New York with, until she decided she didn't want to go with him, and then he went on the drinking toot.

Then the defendant picked him up at some bar and took him around to the tourist home. She wasn't satisfied with the amount of money that she was going to get. She wanted that plus what he had over on the windowsill. And he came back from the restroom when she was in the act of getting the money. And he had disrobed because he was found nude. She was in the room and had access to the weapon. She knew people she would pick up on 7th Street in a bar would be armed with something. It is a wonder she didn't get a gun instead of a knife. All she found was a great big sheath knife. When he came back and started raising cane about his money, that is when she let go. Certainly, he went after her for the money.

MR. GASTON: I do recall—

THE COURT: There was no attempt in this case by the Government at any time to present the decedent in any fashion [19] other than the light in which he was presented. The decedent's wife took the stand. There was ample opportunity—and she certainly demonstrated hostility. She said she wasn't even willing to go to New York with him and reconcile with him because they had all kinds of differences.

So it isn't like the decedent was pictured to this jury as some—well, I can't say white knight in shining armour—black knight in shining armour.

He was made out to be exactly what he was.

MR. GASTON: Well, I do recall the wife testifying she was unable to go to New York with him. But I personally don't recall it was because of his violent character.

THE COURT: I didn't say that she said it was because of his violent character. It was indicative of the fact that she wasn't willing to reconcile with him. She didn't want to have anything to do with him, even though he had some money in his pocket.

All I am suggesting is that there was ample opportunity to explore any of this business and put it in any light that you wanted to put it. There was no attempt by the Government to paint it in any other fashion. There was nothing excluded by way of proper evidence by the Court.

MR. GASTON: I will agree with all of that.

THE COURT: You will have to agree with it because that is the fact.

[20] MR. GASTON: Well, I think that could rightly be drawn from certain facts.

THE COURT: The jury drew them, and the jury drew them in proper context. And where the Court of Appeals in its order remanding this case got any indi-

cation from anything that I have said or done in this case that I was about to grant a new trial, I do not understand, because my order denying your motions was under the then applicable law, namely, when the case was under appeal, I had no jurisdiction to consider a new trial. They remanded it for my consideration.

But I don't think there is any justification for the inference in this order that I was prepared to grant your motion for a new trial. And I am not granting a motion for a new trial in this case.

MR. GASTON: Could I make one other point for the record, Your Honor, and then I will close.

As to the discussions which Mr. Clarke refers to we had wherein it was pointed out that neither the decedent nor the defendant were pillars of the community, and the statement that I could have subpoenaed the police records, it is true that Mr. Clarke did indicate to me that they were not pillars of the community. But I fully expected that any information that I was entitled to that Mr. Clarke would turn over to me. For all I know, any information he may have had may have had to do with gambling, prostitution or any number of other things.

[21] I would also like to, on one occasion in another case, I remember approaching then Assistant United States Attorney John Gill requesting a stipulation from him that he would turn over to me any exculpatory evidence. And he denied that request flatly, saying that it was an insult to his integrity, because he was obligated under the law to turn over anything to me that was favorable to the accused, and by my making the request, I was insinuating that he was unwilling to do that.

So when I was engaged in these conferences with Mr. Clarke, I fully expected under that attitude that I would be given any information that would be favorable to the accused. And I think that in this case the issue of the decedent's prior background showing that he had a tendency toward violence and assaults went right to the very heart of this case as to who was the aggressor in that room.

THE COURT: But, you see as to who was the aggressor, let's assume that he was the aggressor. Let's assume that he was the aggressor. As Mr. Clarke points out, there was no indication that as a result of the decedent's aggression, she suffered a bruise or anything else, none whatsoever.

MR. GASTON: She had the knife.

THE COURT: You said that the decedent was the aggressor?

MR. GASTON: That's right.

[22] THE COURT: Yes. Aggressor in what?

MR. GASTON: Coming after her and she was defending herself with the knife and stabbing him in the process.

THE COURT: Yes.

MR. GASTON: And his concern was for the knife and going after her and trying to avoid the knife, but still continuing to go after her. That is my argument.

THE COURT: So even assuming that he was the aggressor, that doesn't give her the right because of that aggression to go any further in repelling his aggression than was necessary, does it?

MR. GASTON: Well, Your Honor, I think that the jury, if given the additional information, might very well—

THE COURT: Have thought that he was a thug who carried a knife and was used to a fight. She knew when she picked him up, she knew what he was. And you say it would have made all the difference in the world if they had known before he had been convicted of X, Y and Z, or two assaults, or whatever it was, carrying a deadly weapon. They knew he carried it, knew he brought it in. There was no contention she brought the knife in.

MR. GASTON: That's right.

THE COURT: None whatsoever. You say that a CDW conviction and an '63 ADW conviction would have made all of the difference in the world?

[23] MR. GASTON: I am saying that it was enough evidence that the jury would have found it of significance in making their determination.

THE COURT: All right. I don't think there is any justification under the law as I understand the facts of this case for a new trial.

MR. CLARK: Your Honor, the Government has taken the liberty of preparing an order in this case. We will submit it to the Court for its perusal.

(Hearing concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned Official Reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 2081-71

UNITED STATES OF AMERICA

v.

LINDA AGURS

ORDER

Upon consideration of defendant Linda Agurs' motion for a new trial and the opposition thereto filed by the Government, this case having been remanded to this Court by order of the Court of Appeals on July 16, 1973, and it appearing to the Court that defendant has failed to state a claim upon which a new trial should be granted, *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *Moore* v. *Illinois*, 408 U.S. 786 (1972), it is hereby

ORDERED, that defendant's motion for a new trial be and hereby is denied.

/s/ Aubrey E. Robinson
AUBREY E. ROBINSON
United States District Court
Judge

Date: July 24, 1973

[Filed Dec. 3, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeals No. 72-2072
73-1956

UNITED STATES OF AMERICA

v.

LINDA V. AGURS, APPELLANT

COUNSEL'S MOTION FOR CONSIDERATION OF APPOINTMENT OF SUBSTITUTE COUNSEL FOR APPELLANT

Robert T. Gaston, court appointed attorney for the appellant, Linda V. Agurs, moves this Court to consider appointing a substitute counsel to represent her, and states as his grounds therefor:

1. On December 16, 1971, the United States District Court for the District of Columbia appointed Robert T. Gaston, the undersigned counsel to represent Linda Agurs *nunc pro tunc* as of September 27, 1971.

2. Mrs. Agurs was accused of committing second degree murder upon James Sewell. The direct evidence elicited much later during the trial (July 5-7, 1972) was to the effect that James Sewell and Mrs. Agurs entered a room in a tourist home; shortly thereafter the desk clerk heard screams from Mrs. Agurs requesting help; the desk clerk and some other workers in the tourist home broke down the locked door to the room and found Mrs. Agurs and Mr. Sewell on the bed, Mr. Sewell on top of Mrs. Agurs struggling with Mrs. Agurs over a knife which was pointed downward toward Mrs. Agurs; the individuals entering the room pulled Mr. Sewell off Mrs. Agurs and struggled with him for approximately 20 seconds before extracting the knife from his grasp; while

Mrs. Agurs was virtually unwounded, Mr. Sewell sustained several wounds which eventually caused his death on the evening of the occurrence. This brief outline of the evidence at trial is provided at the outset of this motion to highlight the importance of the issue of who was the aggressor in the struggle between Mrs. Agurs and Mr. Sewell. From the beginning, self-defense was the primary defense available to Mrs. Agurs.

3. On January 11, 1972, the undersigned counsel, Linda Agurs, and Assistant United States Attorney John Clarke, Jr., appeared before Judge Aubrey Robinson of the United States District Court for the District of Columbia for the purpose of reviewing Mrs. Agurs' bond and also to report on the status of the case including discovery. At that court appearance, said counsel stated that he would like to have a stipulation as to discovery placed on the record. Judge Robinson asked if it was really necessary, indicating that he had never had any problem in regard to Mr. Clarke turning over information to defense counsel. Counsel stated that there had been no problem up to that point but that he wanted to cover matters which might arise in the future. Judge Robinson indicated that if there should be any trouble in obtaining information during the proceedings that counsel should notify him. As a consequence, no stipulation was made on the record. (This information is presently obtained from a memorandum of that proceeding made by counsel and just recently found by him. A transcript of that hearing is being requested.)

4. While counsel's file makes no mention of it, counsel does recall that either on January 7 or February 2, 1972, Mr. Clarke did state as an aside to counsel that neither Mrs. Agurs nor the decedent were pillars of the community.

5. On April 24, 1972, while counsel was interviewing a witness, the witness indicated that he had heard that the decedent might have been arrested a number of times and possibly convicted for assaulting various people including a police officer with a knife. Counsel made a note of this conversation thinking that if the decedent did in fact have such a record and Mrs. Agurs knew of it at the

time of the incident that evidence of the decedent's prior record would be helpful and admissible for the purpose of showing the reasonableness of her conduct in defense of herself.

6. During either the first or second week in May, 1972, counsel conferred with an older, semi-retired member of the District of Columbia Bar who had had a large amount of experience in practicing criminal law and who also was a professor of criminal law during a portion of his career. Counsel asked this individual if he knew of any way that the possible past record of the decedent could be admitted into evidence if Mrs. Agurs did not know of that record at the time the incident occurred. He first agreed with counsel that there would be no problem getting such a record into evidence if Mrs. Agurs knew of its existence at the time of the incident. He went on to say that he knew of no way that counsel could get the record into evidence if Mrs. Agurs did not know of its existence at that time. However, he suggested that counsel review the case of *Griffin* v. *United States* (D.C. Cir.—1950) 183 Fed. 2d 990, and stated that he would think the matter over and if he came up with anything, he would let counsel know. Counsel did not hear from him again on this matter.

7. On June 2, 1972, one month from the trial date of July 5, 1972, counsel conferred with Mrs. Agurs who indicated that she did not know of any criminal record that the decedent might have had.

8. In light of Mrs. Agurs' statement and the conference with the above described member of the Bar, counsel felt quite sure that any evidence of the decedent having a past criminal record would not be admissible. This, coupled with the pressing need to prepare for trial on what seemed much more promising grounds, led counsel to all but forget about any past record of the decedent that might have existed.

9. Counsel believes that it can be said with some objectivity that had the government informed him of the actual existence of the decedent's past record during discovery proceedings, he would most likely have continued to pursue the matter to the extent of at least researching the admissibility of such evidence notwithstanding Mrs. Agurs

lack of knowledge of it at the time of the inciednt.

10. On July 5, 1972, trial began. The defense raised was that of self-defense, and one of the primary issues, if not the ultimate issue, was whether Mrs. Agurs or the decedent was the aggressor in the struggle which led to the latter's death.

11. On July 7, 1972, Mrs. Agurs was found guilty by the jury of second degree murder.

12. On October 20, 1972, Mrs. Agurs was sentenced by Judge Robinson to five to twenty years imprisonment.

13. On November 13, 1972, this Court appointed counsel to represent Mrs. Agurs on appeal.

14. On Saturday, November 18, 1972, the undersigned received at his office the Monday, November 20, 1972, issue of the Washington Law Reporter, Volume 100, Number 225. On the front page of that issue, appeared the case of *United States* v. *Burks*, U.S. App. D.C. No. 71-1821, October 19, 1972, —— U.S. App. D.C. No. ———, 470 Fed. 2d 432. The opinion stated in part, on the front page of that issue:

> As this Court has long recognized, evidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised. Such evidence is relevant on the issue of who was the aggressor and, where there is evidence that the defendant knew of the deceased's character, on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily injury.

Then later on Page 2284 of the same issue, the opinion further stated:

> As noted earlier, however, where self-defense is raised and there is an issue as to who was the aggressor, evidence of the deceased's violent character is relevant and admissible even though unknown to the defendant. Thus the defense in this case had a right to prove any violent acts of the decedent, regardless of whether appellant testified that he knew about those acts.

15. On November 20, 1972, counsel attempted to reach

Assistant United States Attorney John Clarke and tried again on November 21 on two occasions. On November 22, counsel went personally to the United States Attorney's Office and finding Mr. Clarke absent spoke with Assistant United States Attorney John Mulrooney. Counsel requested that he review the United States Attorney's file on this case to discover whether or not the decedent had a criminal record of assault. Counsel went with Mr. Mulrooney to what was apparently a "closed files" room where Mr. Mulrooney located the file and after searching it for approximately four or five minutes found the decedent's police record near the beginning of the file. The record disclosed that he had in fact been convicted of at least one charge of assault and another charge of carrying a dangerous weapon. Counsel contends that the record also reflected convictions for assault with a dangerous weapon and assault on a police officer, but the government disputes this contention.

16. Upon discovery of the record, counsel believed that among the possible arguments for appeal were the government's failure to inform defense counsel of evidence favorable to the accused (the decedent's past record) and the ineffective assistance of counsel. Counsel believed then, as he does now, that the decedent's prior record should have been brought to the attention of the jury and that the jury would have found the evidence of significance in making its determination. Obviously, the failure to get the evidence to the jury was due either to the government's failure to disclose the decedent's criminal record to counsel, or counsel's failure to pursue a lead indicating that the decedent might have had a criminal record.

17. Rule 33 of the Federal Rules of Criminal Procedure state in substance that a motion for a new trial based on the ground of newly discovered evidence may be brought within two years after final judgment, but that a motion for new trial based on any other grounds must be made within seven days after the verdict or finding of guilty. As set forth earlier, counsel did not realize the existence of the above described issues until he read the *Burks* case one month after Mrs. Agurs was sentenced. Therefore, counsel believed that the issue of ineffective assistance of counse could be raised upon appeal only. He believed further that the issue of the discovery of new evidence (the decedent's past record) and the government's failure to produce it could be raised at the District Court level via a motion for new trial. It appeared to counsel that Mrs. Agurs interests would best be served by proceeding in such a fashion. (In light of this Court's recent decision in *United States* v. *De Coster* U.S. App. D.C. No. 72-1283, October 4, 1973, the Washington Law Reporter, October 31, 1973, counsel now believes that perhaps his ineffectiveness at trial could have been raised simultaneously in the motion for a new trial.)

18. Therefore, on February 2, 1973, counsel filed in the United States District Court for the District of Columbia a motion for a new trial on the ground of newly discovered evidence and the government's failure to produce it. On July 16, 1973, this Court ordered the appeal remanded to the District Court for a decision on the motion for a new trial. Upon remand, the motion was denied and a new appeal was taken from that denial. On November 5, 1973, the two appeals were consolidated.

19. At this point, counsel feels that the issue of ineffective assistance of counsel must be raised, and the question arises as to whether someone other than himself should argue the point. Counsel has conversed by telephone with his client concerning the matter, and she has indicated that she would like counsel to remain in the case. However, since counsel was appointed to represent Mrs. Agurs by this Court, he believes that the ultimate decision should be made by the Court which may believe that regardless of counsel's desire to be objective, another attorney might well pursue the issue of counsel's ineffectiveness with greater vigor. Should the Court see fit to appoint another attorney, counsel will, of course, make himself available for consultation with that attorney.

/s/ Robert T. Gaston
ROBERT T. GASTON
Court Appointed Attorney for Appellant
4702 Chevy Chase Drive
Chevy Chase, Maryland 20015
652-4822

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was hand-delivered to the United States Attorney s Office. United States Courthouse, Washington, D.C. 20001 and mailed, postage pre-paid this 3 day of December, 1973, to the Appellant, Linda V. Agurs, Box A, Alderson, West Virginia 24910.

/s/ Robert T. Gaston
ROBERT T. GASTON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

v.

LINDA V. AGURS, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 4
U. S. Courthouse
Washington, D. C.
Wednesday, April 17, 1974

The above-entitled matter came on for hearing on Motion for New Trial in open court at 9:55 o'clock a.m., before THE HONORABLE AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O. B. CLARKE, ESQ.,
Assistant United States Attorney, appearing on behalf of the United States of America.

EDWIN J. BRADLEY, ESQ., and
ALLAN RUBENSTEIN,
appearing on behalf of defendant.

—oOo—

EUGENE T. FEDORATION
Official Court Reporter
6804 U. S. Court House
Washington, D. C. 20001

[2] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

MR. BRADLEY: Your Honor, my name is Edwin Bradley, representing Mrs. Agurs in the Court of Appeals in connection with her appeal there. This is Allan Rubenstein, a third year student at Georgetown Law Center, authorized by Rule 20 of this court to participate in the appeal. Do we have Your Honor's gracious consent to allow Mr. Rubenstein—

THE COURT: I think he has been so advised, counselor.

MR. BRADLEY: Thank you.

MR. RUBENSTEIN: May it please the Court—

THE COURT: I wonder, before we start this, I have a short matter, merely to set a trial date in the case. I wonder if I could take care of that. Then I will hear you.

(Whereupon, the Court proceeded with other matters on its calendar, at the conclusion of which the following proceedings were had:)

THE COURT: Now, Mr. Rubenstein, we are ready to hear you.

MR. RUBENSTEIN: The defendant asks this Court for a new trial as required in United States v. DiCosta because she asserts that in the preparation and at her trial for second degree murder, the trial counsel provided her with ineffective assistance by being substantially in violation of the requirement [3] in DiCosta, therefore denying the defendant her Sixth Amendment right to counsel.

It is defendant's position that trial counsel, in cooperation with the defense, has fully stated the facts leading to the conclusion of ineffectiveness. Those facts are stated in its motion that was filed with the Court of Appeals and in the affidavit that was attached to the motion in this case in this hearing.

It is defendant's position that there is no issue of fact as to what trial counsel did or did not do, and that the

government cannot fairly dispute what trial counsel did or did not do. There is no other conclusion from trial counsel's written assertions but that he was ineffective under the DiCosta standard.

That being the case, the defendant contends that the burden of going forward shifts to the government who must show that trial counsel's substantial violation of the DiCosta standard of effective assistance of counsel is harmless error beyond a reasonable doubt. This procedure is in accordance with the case of Chapman v. California where the Supreme Court said that the beneficiary of a constitutional error—the government in this case—must prove that there is harmless error beyond a reasonable doubt and that the error complained of—here trial counsel's ineffectiveness—did not contribute to the verdict obtained. DiCosta reiterates this procedure.

[4] Defendant contends that trial counsel violated the requirement of DiCosta, that is, that requires that defense counsel make adequate legal and factual investigations prior to the trial. In his motion with the Court of Appeals, trial counsel stated that he was told by a witness that the decedent had possible arrests and convictions of violence. In his affidavit he stated that neither at that time nor later did he make a factual investigation to follow up that indication of the decedent's reputation for violence. However, a few months before he had met with the witness, he did make a general request of the government, a general discovery request of the government.

In his motion he states that based on a conversation with another attorney, he erroneously concluded that decedent's record, if indeed it did exist, would not be admissible in due evidence. Trial counsel did no personal legal research on this crucial point of law. As a result of no other factual or legal research on this point, trial counsel never discovered the evidence of decedent's reputation for violence, nor its admissibility into evidence.

The standard for ineffective assistance of counsel is stated in DiCosta. Counsel must conduct appropriate investigations, both factual and legal, to determine what

matters of defense can be developed. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities, and, of course, [5] the duty to investigate also requires adequate legal research.

The undisputed facts show that trial counsel has substantially violated the standard which has affected and caused the defendant to be deprived of her Sixth Amendment right to counsel. It is now the government's burden to show beyond a reasonable doubt that trial counsel's error was harmless to the defendant. Specifically, in this case, the government must prove beyond a reasonable doubt that upon retrial, new trial counsel, knowing of the evidence of decedent's violent character and knowing of its admissibility, could gain for the defendant either an acquittal or even a conviction of the lesser included offense of manslaughter.

At this point the defendant contends that she has shown that trial counsel was ineffective and that the government must show beyond a reasonable doubt that the error was harmless to her.

THE COURT: All right.

MR. CLARKE: May it please the Court, Your Honor, as the government has indicated in its opposition to the defendant's motion for a new trial, the government submits that the defense position is based on an erroneous interpretation of DiCosta.

The first point to be considered here, we would submit, is whether DiCosta is retroactive as far as the lifting of the burden as counsel for the defense now claims it is. This trial occurred in June of 1972. DiCosta was decided on October [6] 4, 1973, well over a year after counsel performed in this case and, as the government would submit, performed diligently and conscientiously.

But besides that, the government does not rest its case, Your Honor, on that legal assertion that DiCosta is not retroactive as far as burden. We would submit that even if this Court applies DiCosta retroactively, DiCosta, on its very face, does not show that counsel in this case was ineffective in any way.

Under DiCosta, the Court stated on page 10 of the slip opinion:

"Accordingly, we adopt the following standard."

This is for an interpretation of what effective counsel is considered.

"Accordingly, we adopt the following standard."

"A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate."

That, Your Honor, we submit, is a further expansion or an interpretation of the first part of the Bruce test of ineffective assistance of counsel on collateral attack. The Bruce test indicated that there were two prongs to it that the Court must find before it could find ineffective assistance of counsel. The first part is that there had been or has been, as the Court stated, gross incompetence of counsel, and the [7] second part, "And that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal."

DiCosta merely goes to that first part, to define what is meant by gross incompetence of counsel. As DiCosta indicates, it has to be reasonably effective assistance of counsel.

Now, the government indicated in its response—apparently this remark has hit the quick of appellant counsel at this time—that a trial is not a classroom exercise; it is not something that counsel is graded upon, and if he fails, gets, say, eighty percent or under, then his defendant is entitled to a new trial. There is always error, whether it be factual error or legal error, at a trial. The mere fact of error itself does not indicate that the accused in the case, the defendant on trial, was deprived of effective assistance of counsel. The Constitution does not require perfect representation. It requires, as DiCosta indicated, reasonably effective representation.

Granted, counsel made a mistake in this case on a legal point. However, he recognized that legal point. He did do research, albeit to another counsel rather than

going to the books to find out what was meant by the interpretation. He received an impression from one counsel, and that impression, we might add, Your Honor, up until the Burks case was decided, [8] appeared to be the controlling procedure in this Court as might be evidenced by the fact that the court in the Burks case was Judge Jones.

Now, this does not mean that Judge Jones does not make any legal mistakes. There have been several cases in which he has been reversed. But Judge Jones is a very cautious, conscientious judge, and his impression and the impression of the prosecutor at the time of the Burks case, and the impression of defense counsel, was that before a person's prior record could be introduced into evidence to show disposition to commit violent acts, the accused, the defendant on trial, must have know about those particular acts. That is the same impression of the law that the defense counsel had in this case.

Now, taking that one step further, going into whether or not that erroneous impression of the law indicates or evidences ineffective assistance of counsel, the government would rely upon those cases cited by the defense to show that an erroneous impression of the law can in fact be ineffective assistance of counsel. We do not submit, Your Honor, that it can be. But, assuming for purposes of argument, that it can be, going to the California case of People v. Ibarra, in that case counsel's misimpression of the law was that an accused must have had a property taken from him and not just in his presence before he would have a standing to object to it.

In Ibarra, the defendant's at-trial defense was that [9] he did not have possession of the property that was seized from his person, and, based upon that defense, when the court inquired of him whether or not he wished to raise the motion to suppress, said no, that his defense was inconsistent with the statement of the defendant, the statement of the police officers, and for that reason he did not have standing to challenge the legality of the seizure.

As the Court of Appeals indicated in the Ibarra case, the facts as shown at trial clearly evidence an illegal seizure, and even after the trial court asked and reasked of defense counsel whether or not he wanted to raise the motion to suppress, defense counsel still refused to do so, and as the Ibarra court indicated, counsel's erroneous impression of the law—something that was a cardinal principle in the California courts and in fact in all federal courts too—counsel's erroneous impression of that was something that blotted out the very essence of the defense to the accused, the motion to suppress, which was completely destroyed by counsel's erroneous impression of the law.

In this case it is just the contrary. The defense of the accused in this case all along was that of self-defense. The evidence that is now asserted as being so crucial that it could have resulted in an acquittal is such that it is merely, as we indicated in our response, at best only corroborative of the defense of the accused. It does not raise a separate [10] defense. The defense of self-defense was in the case from the very beginning, in the government's case in chief. The defense had not elected to put on any evidence. The only thing that this would go to was who was the aggressor, the same thing that the government's evidence raised and the defense seized upon to indicate that the defendant should be acquitted.

The evidence now asserted as being so crucial, we would submit, Your Honor, in light of all the evidence in this case is not of such a magnitude—in fact, it is far less than that. Possibly it goes to show a violent character of the deceased. But the very facts in this case showed that also. Here was a man who in the middle of the day picks up a woman in a prostitute situation, a man who is carrying a five-inch sheath knife on his person as well as a smaller knife on his person. A man who enters a motel room in that type of situation and then winds up dead.

But the important and crucial fact, no matter what type of reputation the man had—and this is a 1963 conviction that they are talking about and a 1971 charge

of carrying a dangerous weapon—regardless of that type of evidence, that does not in any way affect the crucial fact that the deceased had five stab wounds, deep stab wounds, besides numerous amounts of lacerations, while the defendant did not have a single mark upon her person.

The evidence of the defense that they now seek to [11] introduce by way of prior criminal record, if anything, would strengthen the government's case, because here is a man who supposedly is so violent and so good with a knife that he always carries one, would it not be reasonable to assume that he wouldn't have received the injuries in that case, that he would have in fact inflicted them upon the defendant if he was in fact the aggressor?

The issue was clearly presented to the jury. It was not blotted out by any erroneous impression of counsel of the law. The jury had the full consideration in this case, and the time of their verdict, twenty-five minutes after they went out, clearly goes to show that the crucial fact in this case was that the defendant did not have a mark on her while the decedent had five marks. The scream of the defendant did not affect the verdict, did not go into the facts in this case except to show one thing: After she had savagely stabbed this man five times, he still came after her. And as the government argued to the jury, the fact of the scream is something that anyone would anticipate after a person who tried to kill someone, the person didn't die but kept on after him.

We submit, Your Honor, that the evidence in this case is not such that it in any way goes to show ineffective assistance of counsel. In fact, the very fact that the defense counsel would claim that he himself was ineffective goes to show more than anything else that Miss Agurs did have the [12] representation of a diligent and conscientious attorney who put his own personal esteem well below that of his client as DiCosta requires. This is a clear example of someone who received the best assistance of counsel that could be afforded.

We would submit, Your Honor, that the defense motion should be denied in this case.

There are no further questions that the government would submit.

MR. RUBENSTEIN: Your Honor, I would like to respond to the points that the government did make. On the first point the government made on retroactivity, it is my understanding of the law that just because the case, the DiCosta case, came down after the trial does not mean if would not apply to the case. Mrs. Agurs was deprived of a constitutional right, and it is not a question of whether the trial took place before. She always had that constitutional right, and unless it is for some administrative reason, the courts have always said that in a case of losing a constitutional right, that the defendant should have it.

THE COURT: What constitutional right was she deprived of?

MR. RUBENSTEIN: Her Sixth Amendment right to counsel.

THE COURT: She had counsel.

MR. RUBENSTEIN: Well, effective assistance of counsel as shown in DiCosta.

[13] On the next point, the government says that DiCosta is only an interpretation of Bruce. DiCosta itself says, on page 8 of the slip opinion, that in Bruce the claim of ineffective assistance arose on collateral attack, and in this case it is not on collateral attack. The court in DiCosta goes out of its way in saying it is setting a standard different than Bruce, and the Bruce standard is ambiguous and it was going to clarify it.

THE COURT: Which is all the more reason to suggest that in the context of this particular case, any suggestion of retroactivity is of less weight. Is that not correct?

MR. RUBENSTEIN: I would agree, yes, Your Honor.

On the next point, speaking of legal research, the government spoke to the fact that counsel did make some research; that is, he spoke with another attorney. The defense would contend that that is not adequate

at all. One has to do his own personal legal research and not rely on another attorney. That is what the defense contends is adequate legal research. And to clarify, the point that the government made was that the Burks case occurred after or came down after this trial. The defense wouldn't argue with that. But Burks relied heavily, if not exactly, on Evans v. United States which came down in 1960, and Evans is the leading case on this very point, that trial counsel did not find out. In fact, Evans is the leading case in ALR just on this exact point. So, it is not as if it is an [14] obscure point as the government tried to compare in People v. Ibarra. This is an important point.

The next point that the government raises is that this evidence was merely corroborative. It is the defense's position that there was no such evidence of the violent reputation of the decedent at trial at all. The defense counsel or trial counsel presented no evidence himself, and the government says that whatever violence—or that there was some evidence of violence in the case, that is, he carried a knife. But the place where decedent and the defendant met was a place that it would be common knowledge that somebody would be carrying a knife or some kind of weapon to protect themselves. So, just the very fact that he had a knife would not say that he had a reputation for violence or was a violent man. Where he was, you would need a knife or any kind of a weapon; it was understood that you need a weapon to protect yourself.

Now, on the next point, of the wounds, the jury in the other trial or in the trial that did occur did not hear any of this evidence that he had a record of violence in 1963 of pleading guilty to an assault on a police officer and several arrests of that nature at the same time, and also in 1971 of pleading guilty to carrying a deadly weapon and other arrests around that time of a violent character. The jury heard none of that. And while hearing none of that, it did hear about the stab wounds on the decedent and of the defendant having no marks.

[15] But a jury in the second trial or in a new trial will have heard that and then could make a reasonable inference that those stab wounds could have occurred in close quarters. Nobody was there. It is totally circumstantial exactly what happened. The defendant did have the knife when the people broke in. But we don't know at all what happened, and the decedent's reputation for violence, which was not shown in the first trial, now will be shown in the second trial and the jury could make a reasonable inference or certainly the government can't explain it beyond a reasonable doubt, that an inference, a reasonable inference couldn't be drawn in the second trial that he was the aggressor, that a scuffle ensued and as a result the decedent died.

So, I would like to go back to the point that or the defense—

THE COURT: Is my recollection of the evidence correct, that there was testimony about the money behind the blind?

MR. CLARKE: Excuse me, Your Honor.

THE COURT: Wasn't there some indication about that? Wasn't money found in this room?

MR. CLARKE: Your Honor, this is the case where the decedent had three hundred and some odd dollars on his person when he went into the room or when he left his wife earlier that day, and at the time of his death he didn't have any money on him, including the change from the payment of the room. I do [16] not remember any money being found on the premises or on the body of the deceased. The government attempted to argue that this was a case of a rolling where the deceased found the defendant going through his pockets after going to the bathroom, and at that time the incident occurred, the killing occurred.

MR. RUBENSTEIN: There was also testimony that the last time anyone had seen the decedent was when his wife had seen him get on a bus, and it was several hours between that time and—

THE COURT: I know the last time he was seen by anybody was the clerk, the clerk of the tourist home, and he told her about the $14, I believe. Wasn't it $14?

MR. CLARKE: I believe it was $10.

THE COURT: Ten dollars for the room, and there was no bathroom. But the last time the decedent was seen was by the tourist home clerk.

MR. RUBENSTEIN: But the clerk didn't know he had the money. But even so, if we even take the most negative inference that she was rolling him, that does not say she was intending to kill him at all. It is very possible that maybe he—

THE COURT: Oh no, she was not indicted for first degree murder.

MR. RUBENSTEIN: All right. Even so, it is not unreasonable that she acted in self-defense. She took the money and then he came after her, then to protect herself she acted [17] in this way. That caused him, the decedent, to die. It is not as if—

THE COURT: Well, I think it was argued—I think all of the inference was that from the situation as it was developed by the evidence, he had gone out of that room to go to the bathroom.

MR. RUBENSTEIN: Right.

THE COURT: And something happened when he walked in the door.

MR. RUBENSTEIN: But the jury does not know of this reputation for violence, only the fact of his carrying the knife, and the defense would contend that that's not enough to say or to infer that he has a reputation for violence, that he carried a knife, that he came from that area where he would very likely carry a knife for his own protection, and the jury was not told at all of the conviction of the years past, of the violence convictions, assaults, assaults on police officers.

THE COURT: And if they had known that, you argued that they would have acquitted him?

MR. RUBENSTEIN: Well, we are not saying that. We are saying that the government has to show beyond a reasonable doubt that there is no chance that she would have been acquitted and there is no chance that the jury would have come back with a conviction of manslaughter. That is for the government to say. We are not saying it is definitely, but it is beyond a [18]

reasonable doubt under the Chapman standard. And it is reasonable for the jury in the second trial, after hearing the new evidence given to them of his reputation—

THE COURT: I thought I charged manslaughter just about as clear as it could be charged.

MR. RUBENSTEIN: That was charged.

THE COURT: —in this case. I thought I charged self-defense as clearly as it could be charged and fully so that every facet of—

MR. RUBENSTEIN: The defendant does not claim that there was any problem with that. The problem is that the jury never found out, because trial counsel had not found, the facts of his record, nor did he believe that such record could have been—

THE COURT: No, no. I am not clear, but the trial counsel didn't know anything about his prior convictions.

MR. RUBENSTEIN: Well—

THE COURT: He never explored them.

MR. RUBENSTEIN: Well, he had an indication and then he decided that—he was just relying on that other attorney's opinion. He understood that even if he did find them, he couldn't have used them. But that was totally erroneous. And as a result, they weren't presented and the jury didn't hear that. Although everything else was proper, the jury never heard it and it wasn't able to draw this other possible reason- [19] able inference, that the government has to show beyond a reasonable doubt that the jury couldn't draw such a reasonable inference.

THE COURT: The high standard to which the government is held.

MR. RUBENSTEIN: Pardon me?

THE COURT: It is a high standard to which the government is held under the rationale of DiCosta.

Excuse me one moment.

(The Court confers with counsel in another case.)

THE COURT: I'm sorry.

MR. RUBENSTEIN: I would like to emphasize that the defense does not contend that there was any error in the trial, at least at this point, any error in the trial itself. As DiCosta says, the court, the trial court will never know, cannot know in any way mistakes or any errors or any other problems occurring outside of the court.

THE COURT: We can know but we are constrained to stay out of it. We are constrained to let counsel make a judgment. For example, this woman did not take the stand. She was the only other person in that room. But her reputation was already perfectly apparent from the testimony as to what happened in the tourist home. But counsel, having conferred with her—

MR. RUBENSTEIN: Well—

THE COURT: Don't interrupt. I will give you an [20] opportunity to speak—made a decision not to put her on the stand. She was the only other person who could have explained that he came busting through that door breathing fire, and before she could move, he jumped on her and started to choke her or do something to her, and she reached over and knew that he had a knife or found a knife that he had on him and protected herself as best she could. She was perfectly free to get on that stand and tell that, if that's what happened.

But she made an informed judgment. It would have been very helpful to the jury, I think, to have known. There were only two people in the room, the decedent and her. You say you didn't kill him or I killed him in self-defense. Why don't you get on that stand and tell us that. We know you are a prostitute. We know you are nothing. We know all about that. We know he is nothing because his poor wife had to come down here and bare her soul.

And that's an informed judgment that counsel was putting to her to make, that he could not demand, nor could the prosecutor, nor could the jury demand that she take the stand.

MR. RUBENSTEIN: Well, the defense is not saying that—we can't say what went into his decision, first of all, of her taking the stand, and also that no inference

should be drawn from the fact that she didn't take it. Her Fifth Amendment right is to remain silent.

THE COURT: You can tell that to juries from now [21] until. It is fine in the Court of Appeals. The Supreme Court has said that with great clarity. But those twelve jurors are not lawyers. They are not lawyers and they are going to want to know why. And self-defense has to be inferred, by the way. Self-defense has to be inferred. Out of an abundance of caution, you give self-defense in a situation like this. So that what you say is technically correct.

MR. RUBENSTEIN: But in addition to that, in the second trial, with the new trial, counsel knowing of the fact of the decedent's reputation for violence and that it is admissible, with those facts in his mind, his tactical judgment might very well be to put the defendant on the stand and testify.

THE COURT: But she didn't know anything about it. So, all you are going to get from her is that now she is going to tell at the new trial what she had an opportunity to tell at the first trial. And she didn't know anything about this man. She never laid eyes on him before. She picked him up in a bar, made a bargain and was prepared to keep her end of the bargain, so she said, or so it was up at least to the time he paid the $10 to the tourist clerk and went in the room with him.

MR. RUBENSTEIN: Well, whether she was a prostitute also does not go to her violent character. It is a question of his violent character. And this would add to that in the new trial, and the first jury did not—

THE COURT: Hindsight is 20/20, counselor. No [22] question about that.

MR. RUBENSTEIN: We are not saying though that the new jury would definitely do this. We are just saying that the new jury—this would be a reasonable inference to draw upon hearing this evidence which wasn't in the first trial, and it is for the government to show that there would be no reasonable inference beyond a reasonable doubt that there could be an acquittal—there wouldn't be an acquittal in the second trial. But even

the distance between another conviction of second degree murder and an acquittal is one thing but it is less between second degree murder and manslaughter.

THE COURT: Oh, I understand your argument.

MR. RUBENSTEIN: Right.

THE COURT: And it is a proposition that figured rather clearly in the DiCosta case.

Do you wish to respond or do you have anything to say?

MR. CLARKE: Just briefly, Your Honor.

Your Honor, the only thing the government would respond to is again the standards that are to be applied and the correct interpretation of DiCosta.

Counsel indicates that once there is a showing of ineffective assistance of counsel, the burden is then on the government to show beyond a reasonable doubt that that ineffective assistance of counsel did not in any way influence the [23] jury's determination of guilt or innocence. In other words, applying the Chapman v. California harmless error standard to ineffective assistance of counsel. We agree with that, Your Honor, in one part.

However, we submit that the defense is rushing the harmless error argument too far into the standards. We would submit that what first has to be found is, one, whether or not counsel was not reasonably diligent and conscientious in his representation of the accused. That's what DiCosta goes to. That is the standard that DiCosta sets forth.

The second thing—

THE COURT: Yes, but counsel argues, Mr. Rubenstein argues that here is a case in which there is no witness to a homicide except this defendant. She doesn't know a thing in the world about him. He has got to talk about self-defense. But the self-defense has to be inferred from all the circumstances in the homicide as are produced in the government's case, unless he is to put her on the stand. She would not make, in his judgment, a good witness. Let's assume that that would be the situation.

Her prior record, whatever it was, could be used against her to impeach her. She could be thoroughly discredited. And the government has the burden of proving what happened, and the government is in no position, except by circumstantial evidence, to show that a man who had a knife was not in fact [24] the aggressor in this situation.

Now, that's not an uniformed judgment in my view for defense counsel to make in the context of the facts that are presented. So, he says, "I will not chance having this defendant take the stand. There is nothing that she can really add except to be all twisted up in trying to justify slashing this man," as I said once before, everywhere except on the bottom of his feet. So, he decides not to put her on the stand.

But what is crucial here, and this is what Mr. Rubenstein is talking about, is that if he had followed up on even a suspicion that since the man had a five-inch knife in a sheath—and oddly enough, he had the knife when he was trying to convince his wife to get on the bus to go to work. So, it wasn't just one of these things that he worried about protecting himself back and forth to work or in the room where he lived. But he had that knife. That was part of his paraphernalia. He ordinarily carried it, presumably. That's a logical inference. And a sheath knife, not just a pocket knife but a sheath knife.

Now, what is crucial here is that at least there was a suspicion and that should have been followed up to know more about this decedent. This is the contention of Mr. Rubenstein. One of the contentions that is being made is that, well, did this decedent have a criminal record? What is the nature of the criminal record? And you find out that if he has a criminal [25] record for larceny by trick and things like that, that's one thing. If you decide not to follow up on that by further investigation, that's a reasonable question. But when you come up with a record that indicates that he has been arrested two or three times for assault, assault with a deadly weapon, assault on a police officer, then it is

incumbent, so say the plaintiffs, to follow up on that to the point that you can make an informed judgment.

But whether you have known enough about the decedent to really get involved in his character and reputation, to point it out before the jury, and then to contemplate it by not discovering as a legal proposition that everyone of those convictions is available when the situation is one in which self-defense is the only theory upon which the defendant can defend against the charges —and it is undisputed on the record and the trial counsel's candor makes it plain that although he was suspicious, he did not follow up. And how can I sit here and say that that judgment, erroneous as it was, would not in fact have suggested to this jury either that self-defense in fact had not been disproved, the government had not borne its burden because it is the government's burden to prove the homicide was not committed in self-defense—how can I say that absent that fact that jury might not have been otherwise influenced with respect to the self-defense assertion, which again was all circumstantial? And how can I also not say that that [26] may have been the consideration between second degree and manslaughter? It is not entirely out of the question at all, is it? It is perfectly reasonable, perfectly logical and very difficult of determination.

MR. CLARKE: Your Honor, the government would submit that the Court does not have to make the determination that the Court just indicated. That, we submit, is the fallacy with the defense argument, by rushing the Hall-Missera too fast. The Bruce standards are one aspect. That's a standard to be implied. The overruling, if that's what it be, in DiCosta of Bruce is an overruling not of standards but of burdens, who has the burden of going forward, who has the burden of persuasion and what, to an extend, is that particular burden?

What, we submit, the court has to find in order to grant a new trial in this case is: First, that counsel was not, as DiCosta describes, a reasonably effective, diligent and conscientious attorney.

We would submit right off, Your Honor, that that is not shown by the record in this case; even counsel's mistake of fact as to what the law implies.

But if the Court finds that counsel was not reasonably diligent and effective or conscientious, then the next determination that has to be made is that that error of counsel, whether it be a factual error or a legal error, was such that it blotted out the essence of a defense. Once the Court finds [27] that second part—

THE COURT: Well, you say "blotted out the essence of the offense." But it has to be in the context of the evidence in this case. That is what makes that determination difficult, Mr. Clarke. I don't think there is any argument about the standard that is to be applied.

MR. CLARKE: Well, Your Honor—

THE COURT: I think without question that the trial counsel's candor in this case must lead to a conclusion that he failed to exercise that legal diligence that is ordinarily required. This was a homicide case. This was not a second degree burglary or something like that. This was a homicide case, and you have to start with that proposition.

MR. CLARK: Right.

THE COURT: The person is on trial for a major felony.

MR. CLARKE: Your Honor—

THE COURT: So, I don't think there would be any difficulty in making the findings with respect to that first aspect.

The second is, in the context of this case, the application of broad legal principles to a particular fact situation is what we are involved with here, not just the enunciation of principles. Nobody disagrees really with that.

MR. CLARKE: Well, Your Honor, the government does not have to show beyond a reasonable doubt that the essence of [28] the defense was not blotted out. That is the next standard, the harmless error, the question in Chapman v. California. That's where the reasonable doubt standard applies. The government must only show under DiCosta—even if DiCosta is applied

retroactively—that the essence of a favorable defense was not blotted out. The defense was that of self-defense. Counsel was able to present to the jury all of the facts—

THE COURT: Granted, what you say is true, Mr. Clarke. But if, with respect to that self-defense, one ingredient would reasonable have made that jury make a determination with respect either to self-defense or with respect to the choice between the degrees of homicide, do we not then have a situation, when it is the misinformed judgment of trial counsel; it can't be laid to the feet of the defendant, it can't be laid to the prosecutor, it can't be laid to the Court—whether under those circumstances it would not be in the interest of fairness and justice to this woman to grant her a new trial?

MR. CLARKE: No, Your Honor. We would submit that it is not the situation. It is not whether or not it could reasonably be interpreted by the jury as an element of self-defense. It has to be such that it by its very self would cause, would probably cause the jury to arrive at a different result. And we would submit—

THE COURT: Well, I strongly suggest that that's part of your problem here, because that might well have been the [29] difference between second degree and manslaughter. I do not agree with defense counsel that in the context of the evidence as I heard it, as it was presented to that jury, that the defense of self-defense would have been available to her.

MR. CLARKE: The difficulty with the Court's position, as far as the government is concerned, Your Honor, in that is that throughout the trial the defense took the position and emphatically enforced to the jury by way of argument, that this was an all or nothing situation; that he was not guilty by that. And even after counsel, the original trial counsel, knew or learned of the possibility of the use of a prior record by way of the Burks case, he still took that position, and that is where DiCosta again enters into it. That's an informed decision of counsel, even after he knew of it, that his

strategic position was go for all or go for nothing. Rather than let the jury compromise, push it to them to such an extent that they would let her walk rather than compromise and give her a manslaughter.

We submit, Your Honor, counsel cannot now come in and second guess that decision by counsel, even after counsel, when he was informed of the facts, did make the determination as to which way he would go.

And just to go back to one point, Your Honor, when the Court ruled upon the Brady v. Maryland motion filed by the initial trial counsel in this case, the court by its ruling [30] impliedly found that the failure of the government to produce such evidence was not such that it would result in acquittal or a different determination by the jury, the same standard that we would submit that the Court must apply in the second element of the DiCosta and Bruce combination determination. The Court has already made that one correlation, that one finding.

THE COURT: Well, yes, but I think my finding with respect to Brady did not have to do so much with the fact that if it had not been produced it would not have affected the jury's verdict. It had to do with what the government's burden was in this situation.

MR. CLARKE: Right.

THE COURT: In other words, I found—I believe my recollection is correct with respect to the Brady argument—in this case, that under the circumstances here, there had been no failure on the part of the government to disclose.

MR. CLARKE: That's correct.

THE COURT: Therefore, whether or not it would have affected the jury's verdict was not the consideration that was involved. I believe that's what I said.

MR. CLARKE: That's correct, Your Honor. The point that the government was referring to was a statement by the Court during that hearing as to the effect of the prior violence evidence, basically to the effect that that in no way changes [31] the facts that this decedent was cut everywhere, every which way.

THE COURT: Yes, but I could be wrong. You see, that's where I might be building error in the case. You see, I am the 13th juror in a sense. I don't think it would have affected it one way or the other, but my judgment is not the judgment of an appellate court.

MR. CLARKE: Your Honor, your judgment is the judgment as to the second standard of Bruce and the second standard of DiCosta, whether this was such as to blot out the essence of a fair defense.

The one example of that was Ibarra where the whole defense of illegal seizure was blotted out by counsel's erroneous impression. We don't have that here. The effect of this evidence, in fact, Your Honor, is basically neutral, the evidence that was presented to the jury.

THE COURT: Well, I understand your point. I just wanted to explore it with you fully.

MR. CLARKE: Okay.

THE COURT: And give everybody an opportunity—

MR. CLARKE: May I just make one other point? The position that the defense takes in this case is such that if an error is made by counsel, whether it be of a constitutional issue, whether it be the right to testify, a search and seizure issue or a self-incrimination point, regardless of what type [32] error that be, if an error is made by counsel, that error is now elevated to the constitutional harmless error position, that if counsel had brought it forward and the Court had erroneously ruled on it, it would not be such. We would submit that that's the fallacy of the argument that brings us back to the two-pronged part of Bruce.

Thank you, Your Honor.

THE COURT: Anything further?

MR. RUBENSTEIN: Well, I think the Court understands our argument.

THE COURT: Oh, I usually get the argument of counsel.

MR. RUBENSTEIN: But I just want to clarify that the government was just emphasizing the Bruce standard, and the defense would totally disagree, that it is not the Bruce standard, it is the DiCosta standard. The Court says specifically that—

THE COURT: Well, let me tell you that if everything that a trial counsel does by way of judgment during the course of a trial raises itself to a constitutional standard, we will have no trial counsel. There are informed judgments that have to be made.

You have posed the question. I will take it under advisement and issue the appropriate order.

[33] (Whereupon, at 10:48 o'clock a.m., the above-entitled matter was taken under advisement.)

REPORTER'S CERTIFICATE

Certified to be the official transcript of proceedings.

/s/ Eugene T. Fedoration
EUGENE T. FEDORATION, C.S.R.
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed May 7, 1974, James F. Davey, Clerk]

Criminal Number 2081-71

UNITED STATES OF AMERICA

v.

LINDA V. AGURS

ORDER

Defendant LINDA V. AGURS has moved this Court to grant her a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Government has filed its opposition, and the Court has heard argument of counsel. The reasons particularized in their Memorandum of Points and Authorities in support of the motion, and the affidavit of trial counsel,[1] counsel on appeal contend that Defendant AGURS was denied the effective assistance of counsel guaranteed her by the Sixth Amendment to the Constitution. *See United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Scott* v. *United States*, 427 F.2d 609 (D.C. Cir. 1970); *cf. Powell* v. *Alabama*, 287 U.S. 45 (1932).

In *DeCoster*, the Court of Appeals defined the relevant standard for evaluating claims of ineffective assistance of counsel to be as follows:

> *"a defendant is entitled to the reasonable competent assistance of an attorney acting as her diligent, conscientious advocate."* 487 F.2d at 1202.

[1] Trial counsel, who initially represented Defendant Agurs on appeal, filed a "Motion for Consideration of Appointment of Substitute Counsel for Appellant. That motion was granted by the Court of Appeals. A copy of the motion was attached by Defendant's motion for new trial and has been considered by this Court.

Appellate counsel argue that in preparation for trial, defense counsel failed to "conduct appropriate investigations, both factual and legal, to determine what matters of defense [could] be developed." Id. at 1204. In particular, it is charged[2] that trial counsel failed to conduct adequate investigation into the alleged violent character of the decedent and likewise failed to adequately research the admissability of such evidence. *United States* v. *Burks*, 470 F.2d 432 (D.C. Cir. 1972); *Evans* v. *United States*, 277 F.2d 354 (D.C. Cir. 1960).

Even assuming, however, that trial counsel failed to provide that effective assistance of counsel required in *DeCoster*, *supra*, this Court finds Defendant AGURS was not prejudiced thereby. The testimony of the Government's witnesses, and their cross-examination by defense counsel, squarely presented the issue of self-defense to the jury. The testimony of Messrs. Lawrence Smith, Thomas Henderson, and Sherman Griffin, employees of the tourist home who arrived on the scene shortly after the stabbing, with regard to screams by Defendant AGURS, continued scuffling between defendant and the decedent after they arrived on the scene and possession and control of the knife at that time, is significant in this regard. Equally important is the testimony of Dr. William J. Brownlee, Deputy Medical Examiner, as to the nature of the wounds inflicted upon the decedent. Also, there was testimony from which the jury could have concluded that the decedent regularly carried a weapon and, in fact, may have brought the knife into the tourist home himself.

In addition, defendant suggests that had trial counsel been aware of the decedent's prior convictions, he may well have advised her to testify, that is, that counsel's error may have prejudiced defendant in the exercise of her right to testify in her own defense.

If such were the case, however, trial counsel could have so stated in his motion to substitute counsel,[3] or in his

[2] Trial counsel's statement of facts, which is contained in his motion for appointment of substitute counsel or appeal, is tendered in support of the charges. *See* ? ? ?.

[3] *See* note 1 *supra*.

affidavit. As the Government aptly states, mere "speculation and conjecture on a movent's part cannot require the other party to shoulder the burden of disproving that speculation." [4]

Therefore, upon the above considerations, and upon consideration of the entire record herein, it is this 7th day of May, 1974;

ORDERED that Defendant's motion for a new trial be, and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

Date: May 7, 1974

[4] Government's Opposition at 4.

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 2081-71

C.A. No. 72-2072

C.A. No. 73-1956

UNITED STATES OF AMERICA, PLAINTIFF

v.

LINDA V. AGURS, DEFENDANT

AFFIDAVIT OF TRIAL COUNSEL

I, Robert T. Gaston, affirm the following:

As trial counsel for Linda V. Agurs in the case of *United States* v. *Linda V. Agurs*, I did not conduct a factual investigation as the decedent's reputation for violence notwithstanding an indication from a witness to the effect that the decedent might have a prior criminal record for assault. I believed such to be inadmissible unless the defendant had knowledge thereof, and the assistant United States Attorney never presented the decedent's prior record to me as I expected he would if such did in fact exist.

/s/ Robert T. Gaston
ROBERT T. GASTON

State of Md.
Montgomery County

Sworn and subscribed before me this day of February 21, 1974.

/s/ [Illegible]
Notary Public

My commission expires July 3, 1976.

SUPREME COURT OF THE UNITED STATES

No. 75-491

UNITED STATES, PETITIONER

v.

LINDA AGURS

ORDER ALLOWING CERTIORARI. Filed November 17, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599873 180

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

NO. 75 - 491

UNITED STATES OF AMERICA,
Petitioner

vs.

LINDA AGURS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

Page

Opinion Below..... 1

Questions Presented..... 2

Statement of the Case..... 3

Reasons for Not Granting the Writ..... 7

Conclusion..... 17

Appendix A..... 1a

TABLE OF AUTHORITIES

PAGE

Brady v Maryland, 373 U.S. 83 (1963).....7,8,10,12,14

Coles v Peyton, 389 F.2nd 224
(4th Cir. 1968).....14

Giglio v United States, 405 U.S.
150 (1971).....7,8,9,10,11

Giles v United States, 386 U.S.
66 (1967).....11

Griffin v United States,
336 U.S. 704 (1949).....15

King v Beto, 429 F.2nd 221
(5th Cir. 1970).....14

Massachusetts v Painten, 389
U.S. 560 (1968).....14

McQueen v Swenson, 489 F.2nd
207 (8th Cir. 1974).....14

Moore v Illinois, 408 U.S.
786 (1972).....7,8,10

Shuler v Wainwright, 491
F.2nd 1213 (5th Cir. 1974).....8,9

United States v Baxter, 492
F.2nd 150, (9th Cir. 1973)
Cert. denied, 416 U.S. 940 (1974).....9

United States v Burks, 470
F.2nd 432 (D.C. Cir. 1972).....5,14,16

United States v DeCoster,
487 F.2nd 1197 (D.C. Cir. 1973).....14

United States v Keogh, 391
F.2nd 138 (2nd Cir. 1968).....9

United States v Rosner, 516
F.2nd 269 (2nd Cir. 1975).....9

United States v Schembari,
484 F.2nd 931 (4th Cir. 1973).....9

TABLE OF AUTHORITIES

PAGE

Wilkerson v McCarthy, 336 U.S. 53 (1949).....15

STATUES:

28 U.S.C. §2106.....14

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 510 F.2nd 1249. Several opinions of judges of the Court of Appeals in connection with its denial of the government's petition for rehearing and suggestion for consideration en banc have been separately reported at 520 F.2nd 82.[1/]

1/ These opinions are attached to the government's petition and will not be reproduced here. We have added, as a short appendix, a portion of the transcript which is relevant to the issues.

QUESTIONS PRESENTED

1. Whether, in a murder case in which the defendant, who stabbed the victim with his own knife, defended on a theory of self-defense, the Government deprived the defendent of liberty without due process of law when, despite agreement that it would turn over all exculpatory evidence, the Government failed to disclose evidence in the possession of the Assistant United States Attorney handling the case that the victim had a record of two convictions for assaultive crimes involving knives.

2. Whether, in the event the Court of Appeals' conclusion that reversal was mandated because of a deprivation of liberty without due process of law is not sustained, the reversal is nevertheless sustainable under the Court of Appeals' supervisory obligation, under 28 U.S.C. §2106, to provide a new trial in the interest of justice.

3. In the event that the Court of Appeals' reversal of Respondent's conviction is not sustained because of the Government's failure to disclose the evidence of the victim's convictions for assaultive crimes involving knives, whether the conviction should, in any event, have been reversed for ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, because defense counsel, without doing any research, dismissed the possibility of admitting evidence of the victim's propensity for using a knive when he found that the defendent was not familiar with the victim's reputation and, as a result, failed to conduct an investigation into the victim's background and character.[2/]

2/ This point was raised by Respondent in the Court of Appeals. Since it decided the case on the issue set forth in the first question presented, that Court did not go on to reach the ineffective assistant claim. Our position is that, if the disclosure issue is not decided

(foot note 2 con't)

for respondent, the ineffective assistance issue must be reached to decide the case.

STATEMENT OF THE FACTS

In general, Respondent is prepared to rely on the facts set out in the Court of Appeals' Opinion.

As that opinion notes, Ms. Agurs was charged with second degree murder for the killing of James Sewell with his own knife. Ms. Agurs was found struggling with Mr. Sewell in a hotel room into which they had checked as husband and wife. He died of stab wounds inflicted on that occasion.

The Government's theory of the case was that Ms. Agurs was a prostitute, that she was in the process of going through Mr. Sewell's pants pockets while he was out of the room and, when he returned and found her, she used his knife, which she got from his clothing, to stab him.

The defense theory was that Ms. Agurs acted in self-defense and, although she did not testify, the case was defended on the theory that Mr. Sewell, who openly wore a Bowie knife, was in fact the one who initiated the use of the knife and, as a result, Ms. Agurs' actions came in the midst of a struggle, to save herself.

In view of that defense posture, the question of whether Mr. Sewell was the sort of man who would have initiated a knife fight, unprovoked, was highly relevant to the credibility of the self-defense theory. It was not likely that the jury would accept the self-defense theory unless they saw Mr. Sewell as aggressor, rather than victim.

There were discussions between Mr. Gaston, Ms. Agurs' defense counsel, and the prosecutor regarding evidence in the Government's possession, and the record reflects the fact that Mr. Gaston made a

request for whatever information the government had and was not refused. No discovery motions were filed, but the transcript of the calendar call of the case reflects the fact that there was apparent agreement as to discovery.[3/] The one item of evidence not turned over to defense counsel by the Government was the prosecutor's summary of Sewell's criminal record, which showed a 1963 conviction for assault and carrying a dangerous weapon (a knife) and a 1971 conviction for carrying a dangerous weapon.

Although he did not specifically request that the government turn over Sewell's criminal record, if any, Gaston later testified[4/] that he believed the prosecution would advise him if they knew that Sewell had a criminal record.

In preparing for trial, Gaston asked Ms. Agurs if she knew of any violence in Sewell's past and, when she said she did not, he decided not to investigate Sewell's background because, he believed, such evidence was not admissible unless the defendent was familiar with it. Gaston did no independent research other than to discuss the matter with an older lawyer, who agreed with him.

Some time after Ms. Agurs' conviction and sentencing, Gaston became aware of the Court of Appeals' opinion in United States v Burks, 470 F.2nd 432 (D.C. Cir. 1972) which referred to the admissibility of

---

3/ See Appendix A.

4/ At the hearing on respondent's motion for a new trial.

evidence of past violent acts of the victim in a homicide case where self-defense is raised as "long-recognized." Gaston went to the United States Attorney's office looking for the assistant who had prosecuted the Agurs case to find out if Sewell has a criminal record. Another Assistant United States Attorney located the Agurs case file and, when he and Gaston went through it, they found the record of Sewell's convictions close to the front of the folder.

Gaston moved for a new trial on the ground that his misunderstanding of the law had prejudiced his client. After that motion was denied the Court of Appeals reversed. Judge Justice's opinion for the Court noted that the case cannot be characterized as one in which there was no request for the withheld information. The Court concluded, however, that the materiality of the evidence was a "much more significant factor" than either prosecutorial misconduct or defense neglect. On that point, it found the evidence of Sewell's proclivity to use and carry knives of sufficient significance on the issue of who was the aggressor to support the conclusion that Ms. Agurs had been denied a fair trial.

The Government's petition for rehearing and suggestion for rehearing en banc, was denied, with four active judges of the Court of Appeals, joined by Senior Judge Danaher, who concurred in the panel opinion dissenting.

REASONS FOR DENYING THE WRIT

Petitioner has characterized this case as being in conflict with decisions of other circuits and of this Court, because it rests upon a "disregard of the customary requirement of a meaningful defense request." (Petitioner's Brief at 9).

Because of this alleged disregard, "substantial confusion" exists, petitioner asserts, among government attorneys over their duty to disclose potentially exculpatory evidence. (Id. at 14)

In fact, as Judge Justice pointed out, this really can't be characterized as a case with no defense request. The record is really unclear as to the scope of the discussions which led to Mr. Gaston's statement on the record that there was "substantial agreement" on discovery. Although there was no specific request for Sewell's prior record, Gaston, who had had the discussions with the prosecutor, believed he would tell him if he knew Sewell had a criminal record.

The law is that, upon request, the government must turn over that information which may be exculpatory. Brady v Maryland, 373 U.S. 83; (1963) Moore v Illinois, 408 U.S. 786; (1972) Giglio v United States, 405 U.S. 150 (1971). The Court has never held that defense counsel must pinpoint the precise information sought to trigger the duty to disclose. This case did not create a need for guidance on what is sufficiently exculpatory to warrant disclosure. Nor does the case present the question of what standard should be employed when there is no request. Petitioner's argument that "[a] general request for all exculpatory information should be viewed as no better than no request at all," (Petitioner's Brief at 10 n.5), is without support

in the case law. Whether it is even consistant with the facts of the case is not clear from the record.

In Brady, the defense merely requested the "extrajudicial statements" of the co-defendant, and not the specific confession which later won reversal for the defendant. 373 U.S. at 84. In Moore, the request was for "all written statements". 408 U.S. at 791. The ground on which this Court decided Moore was that the withheld evidence was insufficiently material; but its reaching of that issue indicates that it found the general request adequate.

In Giglio, the Chief Justice, writing for a unanimous Court, held that the Government's failure to turn over impeachment material on the only witness testifying against the defendant violated due process. There the government's trial attorney had no knowledge of the evidence, and there is no record that defense counsel ever requested the information, although the defense did question the witness at trial concerning subjects covered by the withheld information. 405 U.S. at 152-53.

The Chief Justice reasoned that the Government had a duty to "insure communication of all relevant information on each case to every lawyer who works on it". Id., at 154. The above statement was made in the context of supplying information to all government lawyers on a case, but the object was to make it available to the defense and avoid inadvertant suppression.

Not only are decisions of this Court harmonious with the result here, but so are the holdings of the Courts of Appeals which the Government cites. We do not believe there is a conflict on either the request or the materiality issue. For example, in Shuler v.

Wainwright, 491 F.2nd 1213 (5th Cir. 1974), the court considered defense counsel's request for "all statements, documents, and similar materials in [the state's] possession exculpatory of either of the defendants," to be sufficient. Id. at 1222.

The Ninth Circuit, in United States v Baxter, 492 F.2nd 50 (9th Cir. 1973), held that even though the specific evidence which later proved to be exculpatory was never specifically requested, "[d]efendants' general pretrial requests for favorable evidence" met the Brady test. Id. at 174.

In United States v Rosner, 516 F.2nd 269 (2nd Cir. 1975), no request was at issue, and in United States v Schembari, 484 F.2nd 931 (4th Cir. 1973), the decision notes the absence of a request but does not indicate that point is controlling, dealing instead with the materiality question.

In United States v Keogh, 391 F.2nd 138 (2nd Cir. 1968), the court noted that the failure to make a specific request was not "irrelevant", but the case did not have the additional element, present here, of a discovery agreement which defense counsel thought covered the information at issue. Id. at 147.

Petitioner does not deal with the above decisions in any detail, only mentioning them briefly, and shifts its argument, when convenient, from asserting that there was no request to positing that on policy grounds that requests should be "narrowly and meaningfully drafted" so that the government can avoid administrative paperwork. (Petitioner's Brief at 9, 10,14).

The administrative burdens complained of, (Id. at 13-14), are entitled to no greater weight here than they were accorded in Giglio,

where the Chief Justice said that the adoption of sound management procedures, not violation of due process, was the solution to any attendant administrative burden stemming from compliance with Brady. 405 U.S. at 154.

The government could have eased the negligible administrative burden here--locating and examining the file[5/] -- by asking defense counselor, to frame a more specific request or by full disclosure. But if the government agrees to a discovery stipulation, and leaves the defense trusting that it will supply information, then no excuse of administrative pressure should be heard.

2. Petitioner contends that the Court of Appeals has here defined materiality in a way inconsistent with Brady and Moore (by implication). (Petitioner's Brief at 11-12). In fact, we believe the decision hews close to this Court's decisions. In Brady, this Court was concerned that evidence which "would tend to exculpate [the defendant] or reduce the penalty" had been withheld 383 U.S. at 88. In Moore, this Court "adhere[d] to the principles of Brady...but [held] that the present record embraces no violation of those principles". 408 U.S. at 798. On the unique facts of that case, the withheld evidence was not material because it did not impeach the credibility of either of the two eyewitnesses who testified that Moore committed murder, nor the testimony of the witness who said Moore admitted the crime to him. Id. at 797. The evidence, then, was cumulative and would not tend to

---

5/ Moore is distinguishable in this regard because there the government turned over its file and the suppressed evidence was not readily accessible to the prosecutor, as it was here.

exculpate the defendant or reduce the penalty.

Two other key cases, cited but not analyzed, by petitioner are Giles v Maryland, 386 U.S. 66, (1967) and Giglio, supra, 405 U.S. 150. Their importance lies in the clarification they give to a definition of materiality. In Giles, this Court reversed a rape conviction where the defense was that the victim consented, and the suppressed evidence could have impeached her testimony. The withheld evidence in Giles was structurally very similar to that in this case; it was that the victim had been charged, in juvenile court, with promiscuous consent to sex acts. We read Giles as holding that evidence of proclivity of the victim is highly relevant when the defense is based on the victim's conduct-the same as in this case The Giles test was whether the evidence "might, therefore, have produced an acquittal or, at least, a reduction of penalty". 386 U.S. at 72.

Giglio involved the suppression by the government of an offer of immunity given to the state's only witness. The Chief Justice emphasized the importance of impeachment evidence when the case turned on the credibility of a single witness. 405 U.S. at 54-55. In our case, although Sewell was not there to testify, his "credibility" was very much in issue. Ms. Agurs could not expect to sustain her self defense claim without persuading the jury that he was the sort of person who would be the aggressor.

The circuits have verbalized different standards on materiality, as petitioner has noted. (Petitioner's Brief at 13). But despite the varying way in which courts have stated the materiality standard, the core issue in all cases is whether the jury might have reached a different verdict, if the withheld evidence had been before it. It was

to that issue the Court of Appeals spoke when it reversed defendant's conviction.

Not only does petitioner fail to show a discrepancy between the standard adopted here and the above cases, but the government also ignores the possibility that the jury, given the benefit of the suppressed evidence, will convict of a lesser included offense. Here the jury could have convicted defendant of manslaughter, as the Court of Appeals noted below.

3. The government's concern that United States Attorneys will be confused in evaluating their obligations under Brady if the Court of Appeals' holding is allowed to stand is misplaced. This case does not represent any departure from precedent of this Court. The government's obligation has always been to disclose exculpatory evidence; if a prosecutor decides to play judge and interpret what is necessary to disclose in a niggardly way, there is every reason to expect reversal. Furthermore, the expectation should be especially acute when, as here, the government attorney did not need to search other police records but rather had the information in his file.

The government asks for guidance in this area but has no right to expect an advisory opinion from this Court. A firm rule could not, in either case, be framed because cases involving Brady questions have consistently turned on their particular facts. The objective of full disclosure is best served by giving prosecutors an incentive to bend over backward to avoid problems on appeal.

4. To this point respondent has focused on demonstrating that petitioner's reasons for seeking review are without merit. However, even

if the government's positions were valid, its arguments would be substantially outweighed by the Court of Appeals' analysis of the case, the alternative grounds on which the decision below can be upheld, and and the technical defects which preclude the granting of a writ.

The Court of Appeals' decision was a carefully analized opinion which throughly examined the case law on the subject, analized the facts and considered the degree of materiality in the context of the defense offered, a vital task to perform in all cases of this type. Judge Justice recognized that the case involved unusual facts where the normal method of requesting information was altered by the trial judge's intervention leaving the defense believing it would receive certain information and rendering the record unclear as to the exact wording of the request.

The opinion below cannot be read as reducing the defense request to an irrelevancy. At most, it can be interpreted as saying that, on balance, the clear materiality here, coupled with a good faith effort to enter a discovery stipulation, requires disclosure. Read in this manner, the decision below is a narrow one, but correct and fair.

5. Should this Court decide against respondent on the disclosure question, defendant is entitled to have her alternative claim--that she was denied effective assistance of counsel in violation of her sixth amendment rights--decided. The Court of Appeals left the issue open, because it decided the case on the non-disclosure ground. 510 F.2nd at 1254.

The sixth amendment claim, which was raised by trial counsel in his motion for a new trial, is based upon both counsel's failure to

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investigate Sewell's background and upon his failure to do any legal research on the admissibility of evidence of the victim is proclivities toward violence. Under prevailing case law, those derelictions would amount to ineffective assistance of counsel. McQueen v Swenson, 498 F.2nd 207 (8th Cir. 1974); United States v DeCoster 487 F.2nd 1197 (D.C. Cir. 1973); King v Beto, 429 F.2nd 221 (5th Cir. 1970); Coles v Peyton, 389 F.2nd 224 (4th Cir. 1968).

The ineffectiveness of counsel claim may turn upon the question of whether a defense counsel who had properly researched, the law would have discovered the cases supporting the Court of Appeals' ruling in United States v Burks, 470 F.2nd 432 (D.C. Cir. 1972) (which ruled crimes of a victim admissible in circumstances such as existed here). As to this point, the record is "not sufficiently clear and specific to permit decision..." Massachusetts v Painten, 389 U.S. 560, 561 (1968). This technical defect should preclude review. Id. Moreover, the record is not clear on whether defense counsel was proceeding on the assumption that he had an agreement of "open file" discovery, which is consistent with his understanding that evidence like Sewell's criminal record would be disclosed.

6. As Judge Leventhal points out in his opinion concurring in the denial of the rehearing en banc, the decision below can also be justified on the alternative grounds of it being a proper exercise of the court's supervisory power granted by 28 U.S.C. §2106, which permits reversals "as may be just under the circumstances". 520 F.2nd at 84.

The Court of Appeals could properly have been justified even if the failure to disclose did not quite rise to the level of a Brady

violation; the combination of the suppression plus the ineffective assistance given by trial counsel would more than justify a reversal to prevent a miscarriage of justice.

7. Finally, to render a decision here this Court will have to scan an extensive (and ambiguous) record when its decision cannot be espected to have substantial effect on other than the parties to this litigation - a task which this Court has always been warned to avoid. Griffin v United States, 366 U.S. 704, 717 (1962); Wilkerson v McCarthy, 336 U.S. 53, 66 (1949) (Frankfurter J., concurring). In asking that a uniform standard be established to govern reversals in cases where material evidence has been withheld, petitioner is actually asking the Court to take on the job of reviewing the factual conclusions of the Court of Appeals without likely gain.

The evidence question involved--the admissibility of decedent's convictions--is so local in nature that petitioner would prefer not to see the issue raised, saying that this question is not "of sufficient importance to merit consideration".[6/] Respondent's position on that issue is that the rule of evidence is extremely important, but correctly decided and not the type of issue which usually attracts review in the Supreme Court.

Contrary to the government's, assertion this issue is relevant to deciding whether defendant was given effective assistance of counsel, as noted above, and is also a prerequisite to a decision on whether the government had a duty to disclose here. For if the evidence was admissible at the time of trial under the circuit's law, and the government should

6/ Petition for Writ of Certiorari, p.5, n.2

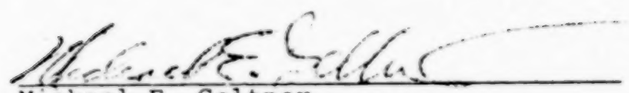
have known this, then the prosecutor's mistaken impression cannot excuse his conduct.

Respondent was denied the opportunity to offer to the jury the one piece of evidence most pertinent to her claim of self-defense. If offered, it would have been considered on the merits by the jury or, in the event the trial judge rejected it, respondent would have been in a position to appeal the error under Burks and put the evidence to the jury on the retrial. Whether the fault was that of the prosecutor or her appointed defense counsel is of secondary importance to respondent. What is important is that, on whatever ground, the Court of Appeals was correct in concluding that she was denied a fair chance to defend on the evidence.

CONCLUSION

For the foregoing reasons, the Government's petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that 2 copies of the attached Brief in opposition to petition for a writ of certiorari was served on counsel for petitioner by mailing, on October ____, 1975, postage paid, addressed to:

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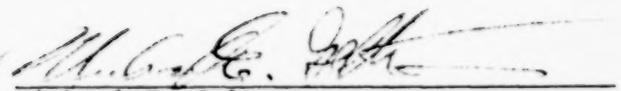

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In addition, we are here for a hearing on motions today. There are no motions to be filed. As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering if we might place that agreement on the record at this time.

THE COURT: If it is necessary. Have you had all of the discovery you want?

MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.

THE COURT: It has been this Court's experience we have never had a problem in that regard.

MR. GASTON: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

MR. GASTON: Yes, Your Honor. Mr. Clarke has also agreed to hand me the grand jury minutes one week before trial. Is that not right, Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

Your Honor, I might also point out that I have sent defense counsel a copy of the autopsy.

MR. GASTON: Then I will make this out.

THE COURT: If you will, I will pass the matter

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No. 75-491

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

LINDA AGURS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	9
Argument	15
I. Since respondent had knowledge of or was on notice of the essential facts concerning decedent's criminal record, she was not entitled to a new trial on the basis of newly discovered evidence	15
II. Absent a prior production request, the prosecution's failure to disclose decedent's criminal record did not constitute a breach of duty that deprived respondent of a fair trial	18
A. Departure from normal Rule 33 standards for awarding a new trial on the basis of newly discovered evidence is justified only when the prosecutor has breached a duty of disclosure	20
B. The prosecution's duty to disclose evidence to the defense normally is conditioned upon a focused defense request	24

Argument—Continued Page

III. Under any standard of materiality, respondent's conviction should not have been overturned 34

Conclusion 37

CITATIONS

Cases:

Alcorta v. *Texas*, 355 U.S. 28 25
Barbee v. *Warden*, 331 F. 2d 842 34
Brady v. *Maryland*, 373 U.S. 83 ..... 8, 13, 16, 24, 25, 26, 30, 32, 35
Clarke v. *Burke*, 440 F. 2d 853, certiorari denied, 404 U.S. 1039 ..... 17, 33
Evans v. *Janing*, 489 F. 2d 470 ..... 33, 34
Giglio v. *United States*, 405 U.S. 150 ..... 14-15, 35
Giles v. *Maryland*, 386 U.S. 66 ..... 17, 25, 30
Gordon v. *United States*, 178 F. 2d 896, certiorari denied, 339 U.S. 935 20-21
Hayes v. *United States*, 367 F. 2d 216 7
Larrison v. *United States*, 24 F. 2d 82 20
Lee v. *United States*, 388 F. 2d 737 29
Levin v. *Katzenbach*, 363 F. 2d 287, remanded, 262 F. Supp. 951, reversed *sub nom. Levin* v. *Clark*, 408 F. 2d 1209 ..... 8, 17, 22, 23, 25, 31, 34
Mesarosh v. *United States*, 352 U.S. 1 36
Miller v. *Pate*, 386 U.S. 1 25
Mooney v. *Holohan*, 294 U.S. 103 24-25
Moore v. *Illinois*, 408 U.S. 786 ..... 13, 14, 24, 25, 30, 33, 35, 37
Napue v. *Illinois*, 360 U.S. 264 24
Pyle v. *Kansas*, 317 U.S. 213 25

Cases—Continued Page

Ross v. *State of Texas*, 474 F. 2d 1150, certiorari denied, 414 U.S. 850 ..... 21, 33
Thompson v. *United States*, 188 F. 2d 652 19
United States v. *Baxter*, 492 F. 2d 150, certiorari denied, 416 U.S. 940 ..... 29, 33
United States v. *Bermudez*, C.A. 2, No. 75-1073, decided November 6, 1975 18
United States v. *Brawer*, 367 F. Supp. 156, affirmed, 496 F. 2d 703 29
United States v. *Burks*, 470 F. 2d 432 ..... 6, 23
United States v. *Clay*, 476 F. 2d 1211 19
United States v. *Cobb*, 271 F. Supp. 159 27
United States v. *Conder*, 423 F. 2d 904, certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958 27
United States v. *DeCoster*, 487 F. 2d 1197 7
United States v. *DeSapio*, 456 F. 2d 644 19
United States v. *Gerard*, 491 F. 2d 1300 ..... 33, 34
United States v. *Harris*, 462 F. 2d 1033 ..... 33, 34
United States v. *Kahn*, 472 F. 2d 272 22
United States v. *Keogh*, 391 F. 2d 138 ..... 27, 28, 34
United States v. *McBride*, 463 F. 2d 44, certiorari denied, 409 U.S. 1027 21
United States ex rel. Meers v. *Wilkens*, 326 F. 2d 135 34
United States v. *Miller*, 411 F. 2d 825 ..... 22, 29, 33, 36
United States v. *Moore*, 439 F. 2d 1107 29
United States v. *Ott*, 489 F. 2d 872 33
United States v. *Overton*, 421 F. 2d 277 19
United States v. *Poole*, 379 F. 2d 645 34

Cases—Continued

	Page
United States v. *Rachal*, 473 F. 2d 1338, certiorari denied, 412 U.S. 927	16
United States v. *Rodriguez*, 437 F. 2d 940	19
United States v. *Ross*, 511 F. 2d 757	16
United States v. *Ruggiero*, 472 F. 2d 599, certiorari denied, 412 U.S. 939	16, 17, 18
United States v. *Schembari*, 484 F. 2d 931	33
United States v. *Slutsky*, 514 F. 2d 1222	16, 17
United States v. *Steel*, 458 F. 2d 1164	21
United States v. *Stofsky*, No. 74-1860, decided November 7, 1975	21
United States v. *Teague*, 445 F. 2d 114	16
United States ex rel. Regina v. *LaVallee*, 504 F. 2d 580, certiorari denied, 420 U.S. 947	16, 35
Williams v. *Florida*, 399 U.S. 78	27
Williams v. *United States*, 503 F. 2d 995	17
Woodcock v. *Amaral*, 511 F. 2d 985	28, 33

Constitution and statute:

United States Constitution, Fifth Amendment	2
22 D.C. Code 2403 (1973 ed.)	2

Rules:

Fed. R. Crim. P. 12.1(a)	27
Fed. R. Crim. P. 12.2(a)	27
Fed. R. Crim. P. 16(a)(1)(C)	16
Fed. R. Crim. P. 16(b) (1971 ed.)	5
Fed. R. Crim. P. 16(b)(1)(A)	27

Rules—Continued

	Page
Fed. R. Crim. P. 33	7, 9, 11, 12, 15, 16, 18, 19, 20, 21, 22, 23, 29, 33, 34, 37

Miscellaneous:

Annotation, 1 A.L.R. 3d 571 (1965)	7
Comment, *Criminal Procedure—Disclosure of Prosecutor's Evidence—Disclosure of Favorable and Material Evidence Required Although Procurable by Diligent Defense Counsel*, 42 N.Y.U. L. Rev. 764 (1967)	31
Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136 (1964)	30-31
8 Moore, *Federal Practice* (1975 rev.)	27
Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. Rev. 437 (1972)	27-28, 31
2 Wigmore, *Evidence* (3d ed. 1940)	7
1 Wright, *Federal Practice and Procedure, Criminal* (1969 ed.)	29
2 Wright, *Federal Practice and Procedure, Criminal* (1969 ed.)	16, 19

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 510 F. 2d 1249.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1975, and the government's timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 6, 1975 (Pet. Apps. B, C, D). On August 28, 1975, Mr. Justice

Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 29, 1975. The petition was filed on that date and was granted on November 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, when the defense is aware of the probable existence of certain information and makes no request for its production, and the prosecution believes in good faith that the information is immaterial, the prosecutor's nondisclosure of this information warrants the grant of a new trial.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be * * * deprived of life, liberty or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted of second-degree murder, in violation of 22 D.C. Code 2403 (1973 ed.), and was sentenced to a term of from five to twenty years' imprisonment. Respondent neither testified nor produced any evidence in her own behalf. Respondent's claim of self-defense was presented solely through cross-examination of

government witnesses and argument of counsel to the jury.

1. On the afternoon of September 24, 1971, decedent James T. Sewell was fatally stabbed in a northwest Washington tourist home. The government introduced evidence tending to show that respondent was a prostitute who had previously used the tourist home in her assignations (App. 86-87). At approximately 4:30 p.m. on the day of his death, Sewell and respondent registered for a room as husband and wife (App. 29, 30). The prosecution's theory of the case was that upon returning unexpectedly from the detached bathroom to their motel room, Sewell had discovered respondent searching through his clothes for money; when he attempted to recover his funds, respondent stabbed him with his Bowie knife, which lay among his clothes. Sewell's estranged wife testified that shortly before his death, Sewell had had $345 in his possession (App. 19). The prosecution also introduced testimony that no money had been found in the motel room, in Sewell's trousers, or in his wallet, which had been ransacked (App. 96).

Additional evidence showed that approximately fifteen minutes after the couple registered, three motel employees overheard screams emanating from their room. Upon forcing open the door, they discovered Sewell and respondent on the bed (App. 32, 33). Respondent had both hands on the handle of the knife, while Sewell had grasped the blade in an apparent effort to protect himself (App. 53). After

they had been separated, Sewell was taken to a local hospital, where he died (App. 62).

The autopsy revealed that Sewell had been stabbed repeatedly in the chest and abdomen (App. 75-76). He had also been slashed about the arms and hands, wounds which the coroner categorized as defensive, suffered in an attempt to ward off blows (App. 76, 77). At the time of respondent's arrest on the following morning, physical examination disclosed no cuts, wounds or bruises on any part of her body (App. 104, 108).

Respondent's attorney argued that the jury could conclude that Sewell had been the aggressor by reference to the presence of a pocket knife in his pants' pocket, his possession of a Bowie knife at the time the couple registered, and the testimony of one witness that, when discovered by motel employees, the decedent lay atop respondent as they struggled for the knife. The jury nonetheless found respondent guilty of second-degree murder after twenty-five minutes' deliberation.

2. During pretrial interviews of potential witnesses, respondent's attorney learned that Sewell might have been previously arrested and convicted on assault charges (App. 159).[1] Her counsel believed that, under the law then governing, the de-

[1] Respondent's counsel admitted (App. 159) that in a pretrial conversation with a witness, "the witness indicated that he had heard that the decedent might have been arrested a number of times and possibly convicted for assaulting various people including a police officer with a knife."

cedent's prior criminal convictions were inadmissible to prove self-defense unless the accused had actual knowledge of the offenses at the time of the homicide. He obtained corroboration of this understanding from a more experienced criminal practitioner (App. 159-160). Accordingly, upon determining that respondent was unaware of Sewell's past acts, defense counsel concluded that further investigation in this area would be pointless (App. 160). Therefore, despite numerous subsequent discussions of the case with the prosecution (App. 146), respondent's attorney neither subpoenaed decedent's criminal record nor requested that the government produce it at trial.[2]

[2] Respondent's Brief in Opposition erroneously contends (Opp. 4-5) that in failing to produce Sewell's criminal record, the government violated its agreement at a discovery hearing to honor defense counsel's request for "whatever information the government had." But the record of that hearing unambiguously demonstrates that the defense made no pretrial request for production of exculpatory information. The transcript shows that respondent's attorney had asked for production of certain physical evidence discoverable under Fed. R. Crim. P. 16(b) (1971 ed.) and that the parties had reached substantial agreement as to its disclosure (App. 10):

> THE COURT: * * * Have you had all of the discovery you want?
>
> [Defense Counsel]: Well, not all, Your Honor, primarily because [the prosecutor] does not have it all in his possession at this time, such as photographs and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.
>
> THE COURT: It has been this Court's experience we have never had a problem in that regard.

[Footnote continued on page 6]

The prosecutor shared defense counsel's belief that, under applicable precedents at the time of trial, the record of decedent's prior convictions was not admissible unless respondent had actual knowledge of those incidents (App. 148). Therefore, no testimony was introduced at trial concerning decedent's past criminal record. Sewell had in fact been convicted in 1963 of simple assault and of carrying a dangerous weapon and in 1971 of carrying a dangerous weapon; the weapon in each instance was a knife (App. 145, 151).

3. Approximately three months after respondent's conviction, the United States Court of Appeals for the District of Columbia Circuit stated in dictum in *United States* v. *Burks*, 470 F. 2d 432, that irrespective of the defendant's knowledge thereof, evidence of the decedent's past violent acts is admissible in a homicide trial in which a claim of self-defense is raised. *Id.* at 434, n. 4.[3] Upon learning of this

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[2] [Continued]

[Defense Counsel]: I have never had any, Your Honor.

THE COURT: If you have any, let me know.

Respondent did not allege that her attorney encountered any difficulty in obtaining discovery of the items that were the subject of this colloquy. Furthermore, the record is devoid of any passage, however generously interpreted, that suggests a defense request for inspection of decedent's criminal record.

[3] The generally accepted rule elsewhere appears to be that evidence of specific violent acts of the decedent involving assaults on persons other than the defendant is not admissible unless known to the defendant or immediately related

decision, respondent's counsel inquired of the prosecution regarding Sewell's criminal record. A search of the prosecution's case file revealed Sewell's past conviction record (App. 162).

Respondent then filed a motion for a new trial on the basis of newly discovered evidence, pursuant to Fed. R. Crim. P. 33. Her attorney argued that in failing to disclose this information *sua sponte*, the government had denied her due process of law. The district court denied the motion, holding that the prosecution's failure to produce this information was not improper because the admission of decedent's record would not have affected the jury's verdict (App. 153-156, 157).[4]

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to the decedent's state of mind at the time of the alleged assault. *Hayes* v. *United States*, 367 F. 2d 216, 223 (C.A. 10); 2 Wigmore, *Evidence* §§ 246, 248 (3d ed. 1940); see Annotation, 1 A.L.R. 3d 571, 601 (1965). Indeed, despite its broad language, the *Burks* holding represented no major extension of this rule, since the defendant there had prior knowledge of the violent act concerning which evidence was excluded.

[4] Respondent's original attorney thereafter withdrew, in order that she might claim on appeal that his failure to pursue Sewell's criminal history had deprived her of the effective assistance of counsel (App. 158-164). Substitute counsel thereafter filed a second motion for a new trial on that ground, which the district court denied after a hearing (App. 188-190). While the court of appeals did not purport to rule on this claim (Pet. App. A, p. 14a), given the minimal probative value of decedent's criminal history, this argument seems to us to be frivolous, even under the liberal standard for assessing such claims followed by the District of Columbia Circuit. See *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.). If the failure to follow up and introduce

4. The court of appeals reversed respondent's conviction and remanded the case for a new trial, holding that the prosecution's failure to disclose the decedent's past criminal record to the defense on its own initiative constituted a denial of due process of law under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83. The court conceded that "[n]o clear consensus exists among the courts on the question of whether, in the absence of prosecutorial misconduct, a defense request is necessary to trigger the prosecution's duty to reveal possibly exculpatory information in its possession" (Pet. App. A, p. 9a). The court did not suggest that the prosecution had deliberately suppressed this information or otherwise acted in bad faith (Pet. App. A, p. 8a, n. 9). It found, however, that in determining whether a given instance of prosecutorial nondisclosure violates due process, "[t]he materiality of undisclosed evidence is a much more significant factor than prosecutorial misconduct * * *" (*id.* at p. 10a). In reliance on its previous decision in *Levin* v. *Clark*, 408 F. 2d 1209, the court held that the Due Process Clause requires a new trial whenever the undisclosed evidence, if brought to the jury's attention, "'might have led the jury to entertain a reasonable doubt about [the defendant's] guilt'" (Pet. App. A, p. 11a; see also *id.* at p. 14a, n. 26). The court concluded that the

into evidence one piece of information of marginal probative value and doubtful admissibility constitutes ineffective assistance of counsel, then we think it can safely be ventured that few litigants have ever received "effective" assistance.

undisclosed evidence of Sewell's violent past was sufficiently material to the question of respondent's guilt or innocence that it outweighed the absence of prosecutorial culpability or lack of defense diligence in procuring that information. It therefore remanded the case for a new trial.

5. The government's petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals. Four active judges, joined by Senior Judge Danaher, a member of the original panel, filed a statement disagreeing with the panel decision and expressing the belief that the case should have been reheard by the full court (Pet. App. D, pp. 20a-22a).[5]

SUMMARY OF ARGUMENT

In order to prevail upon a motion for a new trial on the basis of newly discovered evidence under Fed. R. Crim. P. 33, a defendant must first show that the evidence was in fact discovered after trial and that it could not have been discovered beforehand in the exercise of reasonable diligence. Having surmounted that threshold obstacle, the defendant must in the ordinary case establish that the newly discovered evidence is of such probative significance that it probably would have produced an acquittal. But where the newly discovered evidence was in the

[5] Judge Leventhal filed a separate statement explaining his disagreement with the panel opinion and his reasons for voting against *en banc* reconsideration (Pet. App. D, pp. 22a-24a).

possession of the prosecutor before trial *and* he violated a duty to disclose its existence to the accused, a new trial may be awarded on a lesser showing of probable impact.

In the instant case, the court of appeals did not find that the prosecution had deliberately suppressed decedent's criminal record or that it had otherwise breached any duty of disclosure. The court nonetheless held that the mere post-trial discovery of this information in the government's files justified lowering the showing necessary to obtain a new trial. Applying that reduced standard—whether the evidence "might have" generated a reasonable doubt concerning respondent's guilt (Pet. App. A, p. 11a)—the court found that the prosecution's failure spontaneously to disclose Sewell's criminal record justified a new trial.

1. In so holding, the court of appeals entirely ignored uncontroverted evidence that the information held sufficient to entitle respondent to a new trial was in no proper sense newly discovered. Respondent's trial counsel admitted that he had been put on notice of the fact that Sewell probably had a criminal record during pretrial witness interviews. There seems little doubt that the defense could readily have obtained the particulars of those offenses—these were, after all, official records—by the simple expedient of asking the prosecutor for that information or by the submission of a properly directed subpoena. The matter was not pursued because counsel determined (not unreasonably, in our view) that the

evidence probably would be held inadmissible at trial. Under these circumstances, the inescapable conclusion is that the evidence was known to the defense prior to trial or, at the least, was discoverable in the exercise of due diligence. Accordingly, a new trial could not properly be granted on the basis of a tardy claim that the defense might have wished to utilize the evidence.

2. Even assuming that the court of appeals properly treated the evidence of Sewell's prior misdemeanor convictions as newly discovered, it applied the wrong standard in assessing the sufficiency of the evidence to support the award of a new trial. Its analysis entailed two fundamental errors: it improperly discounted the necessity for finding culpable prosecutorial misconduct as a predicate for departing from the normal Rule 33 standards for determining whether new evidence is weighty enough to require a new trial; and, if its decision is viewed as reflecting a finding of prosecutorial misconduct, that finding was erroneous because based upon a disregard of the principle that the prosecution's duty to disclose information normally is predicated upon the existence of a reasonably focused defense request for production of that information.

A. In the ordinary case, newly discovered evidence will justify a new trial only when it is concluded that the evidence is of such weight that it would probably produce an acquittal. This rather high standard, which has received virtually universal acceptance in the federal courts, reflects the accom-

modation that has been struck between the undeniably important interest of the criminal justice system that innocent persons not be convicted of crime and the weighty interest in preserving the finality of judgments reached after a fundamentally fair trial. It cannot seriously be contended that the evidence of Sewell's prior misdemeanor convictions comes near to meeting this standard.

The application of a more lenient standard for weighing newly discovered evidence cannot, in light of the foregoing, logically be based solely upon the supposed exculpatory potential of the evidence; it must, in other words, reflect policies other than the desire to guard against conviction of the innocent. In our view, the only proper occasion for departing from normal Rule 33 standards arises when it is shown that the prosecution has breached a duty of disclosure or otherwise engaged in material misconduct. In such an instance, greater liberality in passing upon new trial motions is supported both by the desire to erase what may properly be viewed as an unfair conviction and by the deterrent effect that award of a new trial will have upon possible future instances of prosecutorial misconduct. Neither of these salutary objectives could possibly be furthered, however, by the action of the court of appeals in this case, based as it was solely upon the possible utility of the evidence to the defense and the wholly fortuitous circumstance that the information was contained in the prosecutor's files.

B. The opinion of the court of appeals, while seemingly making no finding of prosecutorial misconduct, nevertheless (inconsistently, in our view) concludes that respondent was denied due process of law by the prosecution's nondisclosure of Sewell's prior criminal record. In so doing, it entirely discounted any need for the defense to make a meaningful request before or during trial in order to activate the prosecutor's disclosure obligations. The request requirement is, however, a central ingredient of this Court's previous formulations in *Brady* v. *Maryland*, 373 U.S. 83, and *Moore* v. *Illinois*, 408 U.S. 786, of the prosecutor's disclosure obligations, and we believe that considerations of sound policy and common sense counsel against discarding the requirement.

Ordinarily, as a criminal trial approaches, it is the defense rather than the prosecution that is in the best position to know what evidence the defense already possesses, what theory or theories the defense will rely upon at trial, and what kinds of information are likely to have material exculpatory potential. While the prosecution's files will contain many types of information garnered from various sources, the exculpatory value to the defense of various pieces of information will often not be apparent to the prosecutor in advance of trial, nor does he have any means of knowing what information in his files is not also in the possession of the defense. The submission of a reasonably focused and specific defense request, accordingly, serves to alert the

prosecutor to the potential importance to the defense of certain types of evidence and may properly form the basis for imposition of a duty on the prosecutor to review his files with care to see whether they contain information of the kind requested that appears to be favorable to the defendant and material to the outcome of the litigation.

By dispensing with the request requirement and considering only whether the prosecutor's files contain evidence that "might have" been useful to the defense, the approach of the court of appeals leaves the prosecution with virtually no safe alternative to throwing open its files to the defense prior to trial, a course that this Court indicated in *Moore*, *supra*, 408 U.S. at 795, is not required in our adversary system of criminal justice. Moreover, the approach creates what are likely to prove irresistible temptations to some defendants themselves to withhold some evidence at their first trial or not to pursue certain leads in the expectation that, should they be convicted, a second trial may readily be secured whenever the information in question was in the government's possession prior to trial.

3. Even if the court of appeals were correct in adopting a relaxed standard for assessing the sufficiency of the evidence to justify a new trial, its application of that standard to the facts of this case was erroneous. A new trial is never warranted unless it is shown that there is at least some reasonable likelihood that the nondisclosed evidence would have affected the jury's verdict. *Giglio* v. *United States*,

405 U.S. 150, 154. Here, even had the prosecution apprised defense counsel of the particulars of Sewell's criminal record, there is no reasonable likelihood that the jury might have returned a different verdict. In the first place, it seems clear that the defense would not have attempted to introduce the evidence. But even had the information been available to the jury, the two convictions for carrying a knife were merely cumulative of other evidence already before the jury, while the misdemeanor assault conviction was so remote in time (eight years previously) as to have little or no probative value. Moreover, to the extent Sewell's prior convictions showed a man well versed in handling himself with a knife, the evidence seems actually inconsistent with respondent's self-defense theory, since it is unlikely that she would have escaped from the altercation unscathed had Sewell initially attacked her.

ARGUMENT

I. SINCE RESPONDENT HAD KNOWLEDGE OF OR WAS ON NOTICE OF THE ESSENTIAL FACTS CONCERNING DECEDENT'S CRIMINAL RECORD, SHE WAS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

To prevail on a Rule 33 motion for a new trial on the basis of *newly* discovered evidence, it is tautological that the defense must show that the evidence was discovered after trial. If the defendant knew of the evidence beforehand but chose not to introduce it for strategic reasons, he cannot later obtain a new trial

on the basis of that evidence. See, *e.g.*, *United States ex rel. Regina* v. *LaVallee*, 504 F. 2d 580, 583-584 (C.A. 2), certiorari denied, 420 U.S. 947. The defense also must show that the evidence could not, with the exercise of due diligence, have been discovered until after the trial. *United States* v. *Slutsky*, 514 F. 2d 1222, 1225 (C.A. 2); 2 Wright, *Federal Practice and Procedure, Criminal* § 557, p. 515 (1969 ed.). If the defense was on notice of the essential facts concerning exculpatory evidence before trial but elected not to investigate that information, that evidence is considered to have been in its effective possession. Its failure to utilize that information at trial therefore constitutes a lack of reasonable diligence and should defeat a Rule 33 motion based upon subsequent discovery of that evidence. See, *e.g.*, *United States* v. *Slutsky*, *supra*; *United States* v. *Ruggiero*, 472 F. 2d 599 (C.A. 2), certiorari denied, 412 U.S. 939; *United States* v. *Rachal*, 473 F. 2d 1338 (C.A. 5), certiorari denied, 412 U.S. 927.[6]

The requirements of "new" discovery and due diligence on the part of the defense should not be abandoned simply because the evidence happens to have been in the prosecution's possession prior to trial and the claim for a new trial is thus couched in

[6] Similarly, in considering a motion for discovery under Fed. R. Crim. P. 16(a)(1)(C), the court must consider the availability of the disputed material from other sources, including the defendant's own knowledge. *United States* v. *Ross*, 511 F.2d 757 (C.A. 5); see *United States* v. *Teague*, 445 F.2d 114 (C.A. 7) (*Brady* claim).

terms of the *Brady* doctrine. The prosecution's duty to disclose exculpatory evidence upon request under *Brady* applies only to information in the *exclusive* knowledge and possession of the prosecution. *United States* v. *Ruggiero*, *supra*; see *Giles* v. *Maryland*, 386 U.S. 66, 96 (White, J., concurring); *Levin* v. *Katzenbach*, 363 F. 2d 287, 292 (C.A. D.C.) (Burger, J., dissenting), remanded, 262 F. Supp. 951 (D. D.C.), reversed *sub nom. Levin* v. *Clark*, 408 F. 2d 1209 (C.A. D.C.). Once the accused has knowledge of potentially exculpatory evidence, nondisclosure of that evidence at trial is as much chargeable to the defense as to the prosecution, and it cannot then reasonably be said that the evidence was "suppressed" by the prosecution or that, except in the most extraordinary circumstances, a new trial is warranted. See *Williams* v. *United States*, 503 F. 2d 995 (C.A. 2); *United States* v. *Slutsky*, *supra*, 514 F. 2d at 1225; *Clarke* v. *Burke*, 440 F. 2d 853 (C.A. 7), certiorari denied, 404 U.S. 1039. Were the rule otherwise, the results would be intolerable. Defense counsel would be able to procure second trials for their clients by the simple expedient of withholding a piece of possibly exculpatory information at the first trial, or by failing to develop a pretrial lead in full, in the hope of establishing a nondisclosure claim by finding the same evidence in the prosecution's file after trial.

In the instant case, respondent's counsel learned in pretrial interviews that the decedent likely had had a criminal record. Counsel could easily have

obtained the particulars of that record by subpoena to the police department or through an appropriately drafted production request. If the defense is not thereby charged with actual knowledge of that information, its subsequent failure to obtain decedent's conviction record constituted a failure to exercise due diligence and therefore forecloses the awarding of a new trial based on this evidence under Rule 33. Conversely, since the defense was at least on notice of this evidence, the government's unprompted failure to disclose that criminal history could not have violated respondent's due process right to a fair trial. See *United States* v. *Ruggiero, supra;* see also *United States* v. *Bermudez*, C.A. 2, No. 75-1073, decided November 6, 1975, slip op. 457-458. Indeed, as we now show, there was no impropriety of any kind in the prosecution's failure to volunteer this information, and thus no basis, whether constitutionally derived or in the exercise of the courts' supervisory power, for the award of a new trial.

II. ABSENT A PRIOR PRODUCTION REQUEST, THE PROSECUTION'S FAILURE TO DISCLOSE DECEDENT'S CRIMINAL RECORD DID NOT CONSTITUTE A BREACH OF DUTY THAT DEPRIVED RESPONDENT OF A FAIR TRIAL

Assuming that respondent is able to overcome the threshhold problem that the evidence of Sewell's criminal history cannot fairly be characterized as "newly discovered," it then becomes necessary to select the appropriate standard for weighing such evidence to determine whether it warrants the award

of a new trial. Ordinarily, in the absence of a finding of some form of culpable prosecutorial nondisclosure, a Rule 33 motion for a new trial on the basis of newly discovered evidence will be granted only when it is concluded that the evidence in question would probably result in an acquittal.[7] Decedent's prior criminal record was of such insignificant evidentiary value that by no conceivable stretch of the imagination could that standard be satisfied under the circumstances of this case (see Part III, *infra*). Indeed, the court of appeals did not purport to rest its decision on the normal Rule 33 standard.[8] Rather, the court employed what appears to be the most generous possible standard that still takes any account of the materiality of the newly discovered evidence, *viz.*, whether the evidence " 'might have led the jury to entertain a reasonable doubt about [respondent's] guilt' " (Pet. App. A, p. 11a).

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[7] See, *e.g.*, *United States* v. *Clay*, 476 F.2d 1211, 1215 (C.A. 9); *United States* v. *Steel*, 458 F.2d 1164, 1167 (C.A. 10); *United States* v. *DeSapio*, 456 F.2d 644, 647 (C.A. 2); *United States* v. *Rodriguez*, 437 F.2d 940 (C.A. 5); *United States* v. *Overton*, 421 F.2d 277, 279 (C.A. 5); *Thompson* v. *United States*, 188 F.2d 652 (C.A. D.C.); 2 Wright, *Federal Practice and Procedure, Criminal* § 557, 189-190 p. 518 (1969 ed.).

[8] The district court concluded that the evidence here in question did not satisfy the normal Rule 33 standard (App. 189-190), and the court of appeals did not overturn that holding.